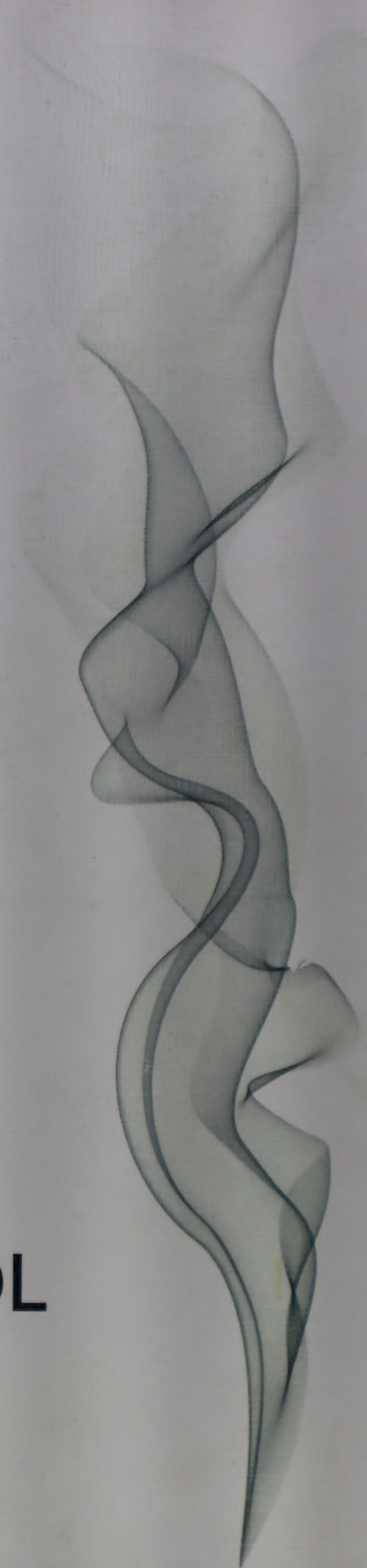


# INDIA'S COMPLIANCE WITH ARTICLE 5.3 OF THE FRAMEWORK CONVENTION ON TOBACCO CONTROL

LEARNINGS FROM INDIA AND ABROAD

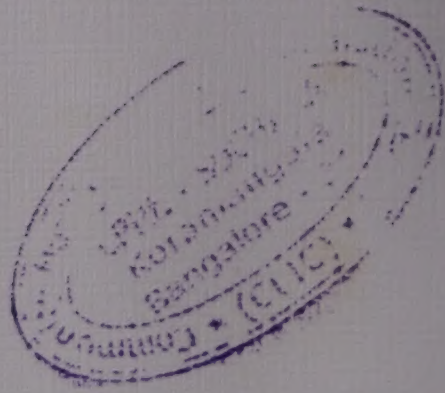


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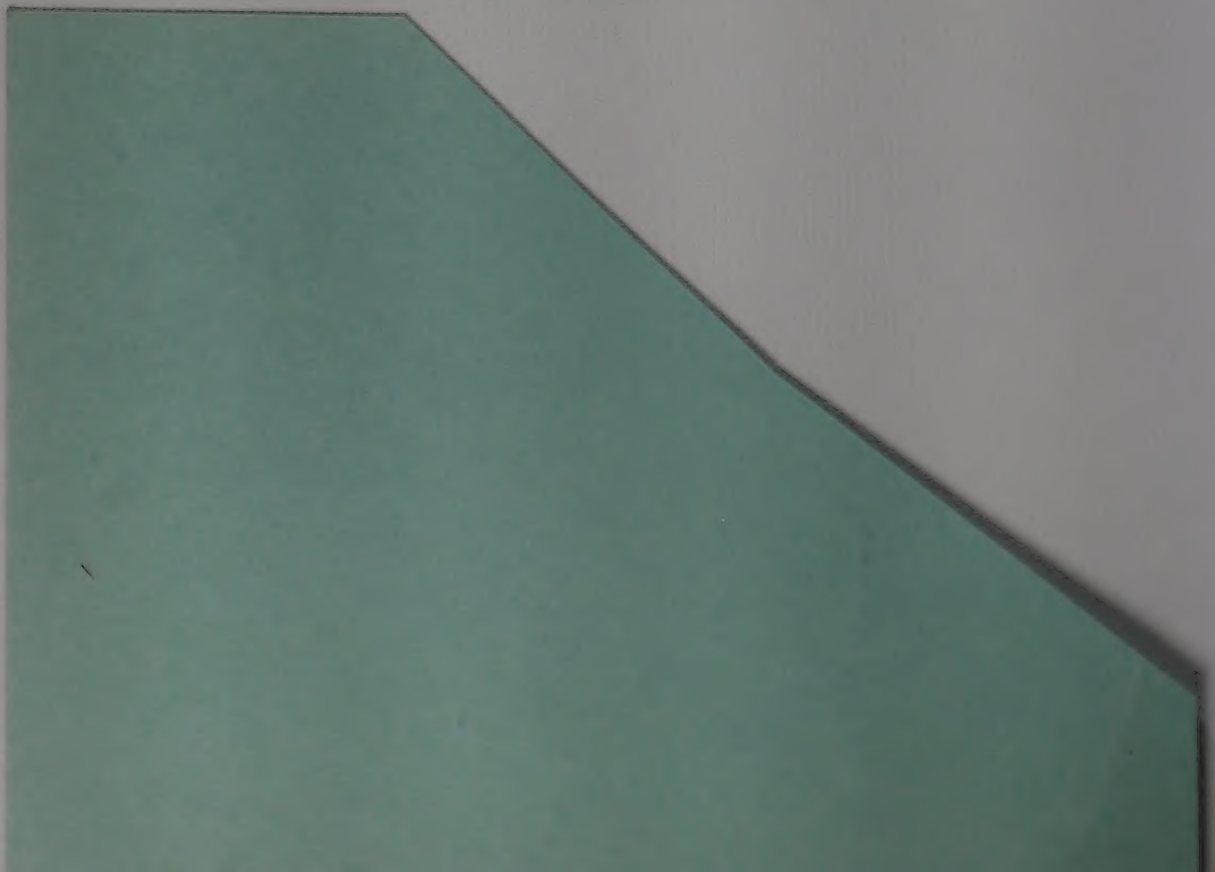




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# INDIA'S COMPLIANCE WITH ARTICLE 5.3 OF THE FRAMEWORK CONVENTION ON TOBACCO CONTROL

LEARNINGS FROM INDIA AND ABROAD

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SUPPORTED BY: TOBACCO-FREE KIDS ACTION FUND

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## EXECUTIVE SUMMARY

Article 5.3 of the WHO Framework Convention on Tobacco Control ("FCTC") requires state parties "to protect public health policies on tobacco control from the commercial and other vested interests of the tobacco industry, in accordance with national law." This Report reviews India's compliance with Article 5.3 of the FCTC, with particular reference to the following four recommendations in the Article 5.3 Implementing Guidelines:

- (i) Limiting interactions between the government and the tobacco industry and ensuring transparency in the interactions that do occur;
- (ii) Not giving preferential treatment to the tobacco industry;
- (iii) Preventing conflicts of interest for government officials and employees; and
- (iv) Regulating and de-normalizing corporate social responsibility ("CSR") activities of the tobacco industry.

India was one of the earliest signatories to the FCTC and in 2003, had enacted Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act ("COTPA") that prohibits smoking in public places, prohibits the sale of tobacco products to minors and places stringent restrictions on advertising of tobacco products. However, as this Report reveals, India has done little to implement Article 5.3 of the FCTC which deals primarily with conflict of interest. There are no laws or policies that have been developed to advance the implementation of Article 5.3 and there are numerous instances of policy decisions in the area of tobacco control and public health being influenced by the vested interests of the tobacco industry. A recent example was the indefinite hold on the implementation of the new packaging rules that require warning labels to cover 85% of the display area of cigarette packages. A few days before these new rules were to come into effect on April 1, 2015, amid pressure and heaving lobbying by the tobacco industry and their allies, the Union Ministry of Health and Family Welfare issued a notification that placed these rules in indefinite abeyance. It also came to light that one of the members of the Parliamentary Committee that was considering these new rules himself owned a beedi company, which represents a serious conflict of interest.

In order to make recommendations for a way forward towards more effective implementation of Article 5.3, this Report has reviewed (a) legislation and policies in other jurisdictions that focus on the four themes discussed above and (b) laws and policies of general application in India that, even if not specific to the tobacco industry, which could be used to monitor and prevent conflicts of interest that could result in the government's tobacco control policies being compromised.



## RECOMMENDATIONS:

Based on this review we suggest that law and policy reforms in the following areas would be key to ensuring India's compliance with Article 5.3 and its implementing guidelines:

The Tobacco Board Act, which contradicts the core principles of the FCTC and Article 5.3 needs to be repealed and the Tobacco Board either disbanded or its mission redefined. In particular, the Tobacco Board should stop providing subsidies, incentives and promotional support for tobacco growing. The process of phasing out subsidies and other forms of support for tobacco farming must necessarily be done alongside efforts by various ministries of the Central and State Governments to rehabilitate tobacco farmers and others involved in tobacco production and support their transition to alternative livelihoods.

(i) India will need to enact certain laws specific to the tobacco industry to advance transparency and prevent conflicts of interest from getting in the way of developing tobacco control laws and policies in the interests of public health. Several jurisdictions have adopted codes of conduct for regulating interactions between government officials and the tobacco industry, for requiring public officials working on tobacco control to disclose any interests or affiliations they may have to the tobacco industry and for government departments to divest any holdings in the tobacco industry. In a public interest litigation, *Institute of Public Health v. Government of Karnataka & Ors.* (W.P. No 27692/2010), the High Court of Karnataka directed the Union Government to consider the adoption of such a code, but the same has not been adopted to date. The recent focus around conflicts of interest in various areas may present an opportune moment for resurrecting a demand for such a code.

(ii) There is currently no clarity from the government on how CSR activities of tobacco companies are to be regulated. Most other jurisdictions have laws that prohibit tobacco companies from any publicity associated with their CSR. Following a public interest petition in the Madras High Court, the Court directed the Union Government to form an inter-ministerial committee to look into devising a scheme to regulate CSR activities of tobacco companies. To date, such a scheme has not been formulated. As the Article 5.3 Guidelines as well as other commentators have made clear, there is an inherent contradiction between CSR and the tobacco industry's core functions and aims, and CSR is often used by tobacco companies to earn goodwill and improve their image. It is, therefore, imperative that the government develops a scheme or policy on CSR that ensures that tobacco companies do not derive any benefits from such activities.

(iii) Finally, laws and policies specific to the tobacco industry could be coupled with laws of more general application on conflicts of interest and transparency, given the urgent need for regulating conflicts of interest in various public policy contexts in India. Many jurisdictions have laws that require the registration of lobbyists and require governments to publish details of all policy interactions with industry.



Another example are laws and policies that impose pre- and post-employment restrictions that prevent public officials from being affiliated with the industry they were regulating for specified periods before and after leaving public office. As discussed in Chapter 4 of this Report, laws and policies that regulate conflicts of interest and ensure transparency in India are very weak and their enforcement has been lax. Two initiatives that present opportunities for reform are:

- The time appears ripe for the introduction of a conflict of interest law such as the Prevention and Management of Conflicts of Interest Bill (2015), a private member bill that was introduced in the upper house of Parliament in April 2015 but could not be taken up for procedural reasons. Unlike the weak and piecemeal approach reflected in other laws and policies, this Bill adopts a holistic view of conflicts and hits at the heart of the matter – to prevent private interests from influencing public policy decision making.
- A move that would go a long way in advancing transparency would be to bring political parties within the ambit of the RTI Act. A public interest petition on this issue is currently pending before the Supreme Court and it is hoped that the Court recognizes the critical need for greater transparency on the funding sources for political parties.



# INTRODUCTION

A relatively lesser known facet of the World Health Organization's Framework Convention on Tobacco Control (FCTC) are the provisions around conflict of interest, between the State Parties' obligations to protect and promote public health and the interests of the tobacco industry. Article 5.3 of the FCTC sums up the obligations around conflict of interest and the Guidelines to Article 5.3 elaborate these obligations further. This Report aims to provide a detailed review of the legal principles emerging out of Article 5.3 obligations around conflict of interest in setting and implementing public health policies, considers examples of legislation from around the world that have been enacted to implement Article 5.3 and reviews how compliant India has been with its obligations under Article 5.3.

Conflict of interest is a set of circumstances where one's professional judgement is influenced or perceived to be influenced by a private or secondary interest. The term first came to be used in connection with the idea of a duty of loyalty or fiduciary duty which refers to a director of a corporation putting the corporation's interests ahead of his or her personal interests.<sup>1</sup> Thereafter, the term soon appeared in the context of public policy making. Just as a director owes a duty of loyalty to a corporation's shareholders, public officials and those in government owe a duty of trust to a country's citizens and are obliged to work in the public interest.<sup>2</sup> Conflicts in the public policy decision-making process thus arise when a public official's private interests, financial or non-financial, influence the performance of his or her public or official duties, thereby undermining the integrity of the policy making process.

When conflicts arise in the making and implementation of public policies on issues such as public health, housing or education that impact millions of citizens, the need to safeguard against, identify and manage conflicts of interest becomes particularly urgent.<sup>3</sup> Such conflicts often occur when powerful industrial players attempt to influence the very policies and regulations to which they are subject. Food and beverage companies, alcohol and tobacco manufacturers have all used a variety of obvious and non-obvious techniques to influence policy-making and dilute regulatory frameworks to their commercial advantage. These techniques include the presence of 'experts' from industry in regulatory bodies; the "revolving door phenomenon", which means policy makers and government officials move in and out of the industries that they regulate; ownership of stocks and shares by the regulators of the companies they regulate; and numerous formal and informal ties

1. Gupta A, Holla R, Suri S. "Conflict of interest in public health: Should there be a law to prevent it?" Indian J Med Ethics. Published online on June 4, 2015.

2. Ibid.

3. Conflicts of Interest Coalition – Statement of Concern, available at <http://www.aaci-india.org/COI/COI-Statement-sept2011.pdf>



between industry and regulators that gives large companies easy access to the regulators charged with monitoring their activities.<sup>4</sup>

Nowhere are these conflicts more apparent or the tactics used more sophisticated than in the case of the tobacco industry. As one commentator has pointed out, tobacco is unique among other products in that "no other consumer product kills one in two users when used exactly as intended."<sup>5</sup> A tobacco company's mission of promoting its product, generating revenues and increasing profits must, therefore, necessarily be at odds with any public health initiatives aimed at tobacco control.

Recognizing this fundamental and irreconcilable conflict between the goals of the tobacco industry and the public health imperative of reducing the demand and supply of tobacco products, the WHO Framework Convention on Tobacco Control ("FCTC") that was ratified in 2004, explicitly addresses the need to isolate the tobacco industry from being involved in a government's policy making on public health. Article 5.3 of the FCTC requires state parties "to protect public health policies on tobacco control from the commercial and other vested interests of the tobacco industry, in accordance with national law." The Guidelines for Implementing Article 5.3 (the "Article 5.3 Guidelines" or the "Guidelines") further provide details on recommended measures that state parties can take to implement the letter and spirit of Article 5.3.

India is a party to the FCTC, being one of the earliest countries to ratify the treaty. In 2003, India also enacted the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act ("COTPA") that prohibits the sale of tobacco products to minors, advertising of tobacco products and smoking in public places. However, to date, India has taken few steps to implement the measures recommended in the Article 5.3 Guidelines and there are several cases where the tobacco industry has been able to influence tobacco control policies and regulations to the detriment of public health priorities.

In this Report, we review India's compliance with Article 5.3 of the FCTC which under the Article 5.3 Guidelines can be categorized into the 3 following issues:

### Interactions with the Tobacco Industry and No Preferential Treatment: The Guidelines require limiting interactions between

4. Arun Gupta, "Why should India Enact a Law on Conflict of Interest," One World South Asia, April 23, 2015, available at [http://southasia.oneworld.net/news/why-should-india-enact-a-law-on-conflict-of-interest#.VYJb9\\_mqqko](http://southasia.oneworld.net/news/why-should-india-enact-a-law-on-conflict-of-interest#.VYJb9_mqqko)

5. Gilmore et al, "Public Health, Corporations and the New Responsibility Deal: Promoting Partnerships with Vectors of Disease?", *Journal of Public Health*, Vol 33, No. 1, pp. 2 – 4, February 2, 2011.



the government and the tobacco industry to those that are strictly necessary and ensuring transparency in the interactions that do occur. Further, the Guidelines also require that state parties do not give preferential treatment to the tobacco industry.

**C** Conflicts of Interest with Government employees and public officials: The Guidelines require state parties to prevent tobacco-related conflicts of interest within government and to identify and manage any conflicts that public officials and government employees might have by virtue of their ties with the tobacco industry.

**C** Corporate Social Responsibility (CSR) by the Tobacco Industry: The Guidelines require state parties to reject partnerships and non-binding/ voluntary agreements with the tobacco industry and to de-normalize and regulate the industry's CSR activities.

For each of these areas, we begin with a background and the rationale behind the recommended measures and the tactics used by the tobacco industry to subvert attempts by governments to isolate it from public policy decision making. We then go on to discuss India's current status of compliance/non-compliance with the recommended measures. We conclude with examples of legislation and policies that other countries have adopted to implement the measures suggested in the Article 5.3 Guidelines. Our review of global laws around implementation of the Article 5.3 Guidelines is not intended to be exhaustive but is instead to present a picture of the range of measures and approaches used by different state parties to the FCTC. In the final chapter of this Report, we look into existing laws, policies and proposed policies in India that deal with transparency and conflicts of interest to explore whether any of these laws or policies could be replicated in the area of tobacco control.



## CHAPTER 1

# INTERACTIONS WITH THE TOBACCO INDUSTRY AND PREFERENTIAL TREATMENT

In this Chapter, we consider the following two related recommendations in the Article 5.3 Guidelines:

- (i) Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur (Recommendation 17(3))
- (ii) Do not give preferential treatment to the tobacco industry (Recommendation 17(7))

## INTERACTIONS OF THE GOVERNMENT WITH THE TOBACCO INDUSTRY

### BACKGROUND

The recommendation for limiting interactions with the tobacco industry are based on the principles of isolation and transparency – isolation to ensure that the tobacco industry is not given a voice in policies regarding tobacco regulation and transparency to establish clear principles for any interactions that do occur between the tobacco industry and government and for any information that the tobacco industry is required to provide. The explanation to this Recommendation states “In setting and implementing public health policies with respect to tobacco control, any necessary interaction with the tobacco industry should be carried out by Parties in such a way as to avoid the creation of any perception of a real or potential partnership or cooperation resulting from or on account of such interaction. In the event the tobacco industry engages in any conduct that may create such a perception, Parties should act to prevent or correct this perception.”<sup>6</sup>

The guidelines for implementing Recommendation 17(3) provide that:

1. Parties should interact with the tobacco industry only when and to the extent strictly necessary to enable them to effectively regulate the tobacco industry and tobacco products; and
2. Where interactions with the tobacco industry are necessary, Parties

6. Article 5.3 Guidelines, available at: [http://www.who.int/fctc/guidelines/article\\_5\\_3.pdf](http://www.who.int/fctc/guidelines/article_5_3.pdf)



should ensure that such interactions are conducted transparently. Whenever possible, interactions should be conducted in public, for example through public hearings, public notice of interactions, and disclosure of records of such interactions to the public.

### **(i) What is the tobacco industry:**

When interactions with the tobacco industry are to be limited, it becomes important to understand what really constitutes the 'tobacco industry'. The FCTC defines "tobacco industry" to include "tobacco manufacturers, wholesale distributors and importers of tobacco products."<sup>7</sup> In addition to these groups, the tobacco industry forms alliances with a number of other players. The tobacco industry does not work in isolation, but with other groups that may invoke a more sympathetic response from the public.<sup>8</sup> Popularly known as front groups, these groups have a commercial interest in promoting tobacco products and often act as mouthpieces for the tobacco industry and may even be funded by them.<sup>9</sup> Examples of front groups include tobacco farmers, the hospitality, packaging and gambling industries, smokers and labour unions.<sup>10</sup> The tobacco supply chain begins with tobacco farmers and, particularly, in developing countries, where most of the world's tobacco is grown, tobacco manufacturers actively promote the economic benefits of tobacco cultivation to local communities despite the detrimental environmental and health impact and human rights abuses involved. When governments propose more stringent tobacco control legislation, groups of tobacco farmers, at the instigation of the industry, have opposed such measures on the grounds that it would wipe out their livelihoods. Thus, in looking into interactions between the government and the tobacco industry, it is important to look not just at the tobacco industry narrowly defined but at front group and others with whom tobacco companies often form alliances.

### **(ii) The Need to Limit Interactions:**

There is ample evidence that the tobacco industry contributes to the global health burden in two ways – directly, by promoting its products and indirectly, by attempting to influence public health policy making of governments.<sup>11</sup> Against this backdrop, the purpose of establishing strict controls over the interactions between tobacco industry representatives at all levels of government is to minimize the possibility of the industry's influence on public health policies. If interactions with the tobacco industry representatives are regulated strictly their ability to influence public policy decision making would be limited.

7. FCTC, Article 1(e), available at <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>

8. See, "Tobacco Industry Interference with Tobacco Control", available at <http://www.who.int/tobacco/resources/publications/Tobacco%20Industry%20Interference-FINAL.pdf>

10. Supra note 8.

9. See, for example, Arun Jitendra and Upendra Bhojani, "How the Tobacco Industry Wins Friends and Influences Policy," dated June 2, 2015, available at <http://www.newslaundry.com/2015/06/02/how-the-tobacco-industry-wins-friends-and-influences-policy/>

11. Gilmore et al, "Public Health, Corporations and the New Responsibility Deal: Promoting Partnerships with Vectors of Disease?", *Journal of Public Health*, Vol 33, No. 1, pp. 2 – 4, February 2, 2011.



At the Fifty-fourth World Health Assembly, the Member States unanimously adopted a resolution calling for transparency in tobacco control.<sup>12</sup> The resolution responded to evidence that the tobacco industry had been subverting the position and role of governments and WHO in implementing public health policies to combat the tobacco epidemic.

### **"Resolution WHA 54.18, Transparency in Tobacco Control"**

Noting with great concern the findings of the Committee of Experts on Tobacco Industry Documents, namely, that the tobacco industry has operated for years with the express intention of subverting the role of governments and of WHO in implementing public health policies to combat the tobacco epidemic;

Understanding that public confidence would be enhanced by transparency of affiliation between delegates to the Health Assembly and other meetings of WHO and the tobacco industry,

1. URGES Member States to be aware of affiliations between the tobacco industry and members of their delegations;

2. URGES WHO and Member States to be alert to any efforts by the tobacco industry to continue its subversive practice and to assure the integrity of health policy development in any WHO meeting and in national governments;

3. CALLS ON WHO to continue to inform Member States of activities of the tobacco industry that have a negative impact on tobacco control efforts."

Thus, both the Article 5.3 Guidelines and the World Health Assembly recognized the dangers of allowing affiliations between the government and tobacco industry to undermine efforts at tobacco control regulation. The Guidelines in particular stress the need for state parties to develop and implement policies and procedures for determining what constitute necessary interactions, prohibit unnecessary interaction and provide clear codes and procedures for the conduct of any necessary interactions.


#### **(iii) Permitted or Necessary Interactions:**

Necessary interactions with the tobacco industry include only those are strictly required for regulating the tobacco industry and enforcing and

12. [http://www.who.int/tobacco/framework/wha\\_eb/wha54\\_18/en/](http://www.who.int/tobacco/framework/wha_eb/wha54_18/en/)



monitoring enforcement of anti-tobacco legislations. The Guidelines identify interactions for the following purposes as falling in the category of necessary interactions:<sup>13</sup>

- 
- Licensing
  - Identifying contraband tobacco products
  - Enforcement actions
  - Proactive or defensive litigation
  - Mandated tobacco industry reporting

The interaction between the tobacco industry and government, in particular government departments charged with regulating the tobacco industry and the demand and supply for tobacco products, must be strictly controlled and made transparent.

When interactions are necessary, the interactions between the tobacco industry and government, in particular government departments charged with regulating the tobacco industry, must be strictly controlled and made transparent. Transparency obligations mandate governments to not only publicly disclose meetings or their interactions with the tobacco industry but also put in place procedures that enable them to do so. This includes indicating when meetings with the industry take place, their purposes or the contents and the outcomes of the meetings. The public should also be informed of government decisions after such meetings through press statements.

**(iv) Unnecessary Interactions:**

On the other hand, examples of interactions, communications, and contacts that are best avoided include working with the tobacco industry or accepting its assistance to draft or implement legislative, regulatory, or policy proposals, participation in or attendance at industry-initiated or funded meetings, seminars, dialogues, or other forums addressing tobacco control and working in partnership with the tobacco industry or accepting or endorsing tobacco industry involvement in any tobacco control or public health programs, such as public education and youth tobacco use prevention campaigns. Apart from being fora where tobacco companies can influence government policies relating to tobacco control, such unnecessary interactions only serve to provide representatives of the tobacco industry with opportunities to interact and have access to those government officials involved in regulating their activities.

13. Article 5.3 Guidelines, Recommendation 17(2), available at [http://www.who.int/fctc/treaty\\_instruments/Guidelines\\_Article\\_5\\_3\\_English.pdf?ua=1](http://www.who.int/fctc/treaty_instruments/Guidelines_Article_5_3_English.pdf?ua=1)



Many Asian countries report high levels of interactions with the tobacco industry that are unnecessary for its regulation, supervision or control and due to such interactions also face high levels of tobacco industry participation in policy development. Cambodia, Indonesia, Malaysia and Thailand, for example, accept assistance or offers of assistance from the tobacco industry on enforcement such as conducting raids on tobacco smuggling or enforcing smoke-free policies.<sup>14</sup> For example the Royal Malaysian Customs collaborated with the Confederation of Malaysian Tobacco Manufacturers (CMTM) in conducting anti-smuggling activities in 2010 and continues this cooperative partnership in tackling the illicit cigarette problem in Malaysia.<sup>15</sup>

However, changes have also started to occur. In Bahrain, when a business association made an official application to the Ministry of Health requesting to add a tobacco investor to the National Antismoking Committee as part of community involvement in decision making, the request was denied. The Ministry of Health stated clearly that tobacco industry representatives are not allowed to interfere with or be part of tobacco control policies.<sup>16</sup> In Cyprus, the Ministry of Health reported in its FCTC compliance report that no tobacco policy would be discussed with the tobacco industry.<sup>17</sup>

## 1. IMPLIMENTATION OF LIMITING INTERACTIONS IN INDIA

India to date has no law or policy that limits the interaction between the government and the tobacco industry or requires transparency in such dealings. On the contrary, numerous examples of such interactions occur on a daily basis. There have been many occasions where the interactions with the tobacco industry have been held which are not permissible as per the Article 5.3 guidelines and which have led to an adverse impact on public health policy. Some of the most flagrant violations of this recommendation are discussed below:

### (i) Tobacco Board Act:

First, the establishment of the Tobacco Board itself provides a ready forum for the tobacco industry to interact with the Union Government. The Tobacco Board Act of 1975 (the "Tobacco Board Act") constituted the Indian Tobacco Board, which is a Union Government controlled-body under the supervision of the Union Ministry for Commerce and Industry. The mandate of the Tobacco Board is to promote the development of the Indian tobacco industry, recognizing the need for regulation of production, overseas marketing and checking the recurring imbalances in supply and demand in the domestic tobacco

14. M. Asunta and E U Dorotheo, "SETCA Tobacco Industry Interference Index: a Tool for Measuring WHO Framework Convention on Tobacco Control Article 5.3", first published online on April 23, 2015, p. 4, available at <http://tobaccocontrol.bmj.com/content/early/2015/04/23/tobaccocontrol-2014-051934.full.pdf>

15. Ibid.

16. FCTC Implementation Database, Available at [http://apps.who.int/fctc/implementation/database/parties/Bahrain%20\(Kingdom%20of\)](http://apps.who.int/fctc/implementation/database/parties/Bahrain%20(Kingdom%20of))

17. See Page 21, Para 3.1.2.4.



market.

Several provisions of the Tobacco Board Act are a clear violation of the principle of limiting interactions between the government and the tobacco industry. The members of the Tobacco Board include those elected by the Houses of the Parliament (3), those appointed by the Central Government (8) to represent various ministries namely Agriculture, Commerce, Finance, and Industrial Development as well as up to 10 members, appointed by the Central Government from among growers of tobacco, dealers and exporters (including packers) of tobacco and tobacco products (Section 4 (4)). Section 8 of the Tobacco Board Act stipulates the primary function of the Board as the promotion of the development of the tobacco industry by all such measures as it deems fit, under the control of the Central Government. Such measures include, among other things, the establishment of an auction platform with previous approval of the Central Government, recommending minimum prices to be fixed for the purpose of export to avoid unhealthy competition and for the purpose of promotion, sponsoring, assisting, coordinating or encouraging scientific, technological and economic research. The provision further stipulates that the Board's functioning be in liaison with Union agencies, institutions and authorities concerned with the tobacco industry. Section 16 of the Act provides for payments to be made to the Tobacco Board by way of grants and loans by the Central Government. The Tobacco Board Rules, 1976 also allow the Board to associate itself with anybody interested in the promotion of the tobacco industry, on the basis of representations made (Rule 10). All of these provisions make clear that the Tobacco Board's primary mandate and function are not to regulate the tobacco industry, but to promote its development and take care of its interests.

#### **(ii) Sponsorship of GTNF 2010:**

In 2010, the Tobacco Board even agreed to sponsor to some extent the Global Tobacco Networking Forum ("GTNF") which was an international tobacco industry event. The sponsorship of the Conference by a Government agency was severely condemned by various tobacco control activist groups and a petition was filed against such participation and sponsorship by the Tobacco Board in *The Institute of Public Health v. The State Government of Karnataka* (W.P. No 27692/2010). The Karnataka High Court observed that the participation and financial contribution of the Tobacco Board in the conference was an indirect promotion of tobacco and hence ordered the Tobacco Board to withdraw its sponsorship and participation in



the conference. This is in striking contrast to the event in 2009 when Tabinfo, a tobacco industry trade event, was held in Bangkok. Although Thailand has a state tobacco monopoly, government officials were instructed not to endorse the event.<sup>18</sup> The Court also directed the Union Government to consider adopting a Code of Conduct to comply with its obligations under Article 5.3 of the FCTC. Despite these orders, till date the Government has not adopted a Code of Conduct as directed by the Court.

### **(iii) Pack Warnings Delayed:**

In the most recent examples of tobacco industry interference, the new cigarette pack warnings mandating that 85% of the pack be covered with health warnings and were to come into force from 1<sup>st</sup> April 2015, were indefinitely delayed due to interference from the tobacco industry. The Cigarettes and Other Tobacco Products (Packaging and Labelling) Amendment Rules, 2014 (the "Packaging Rules") was due to come into effect on April 1 2015. However, on March 26, 2015, the Government issued a notification stating that the implementation of the new Packaging Rules would be delayed indefinitely. There is much evidence that the reason for the delay in implementation of the new Packaging Rules was the strong lobbying efforts by the tobacco industry.<sup>19</sup> An application under India's Right to Information Act, 2005 (RTI), for example, showed that the Tobacco Institute of India (TII) sent repeated representations to the Union Ministry of Health and Family Welfare asking it to withdraw the notification for the new Packaging Rules.<sup>20</sup>

This kind of tobacco industry interference would not have happened if India had laws that mandated strict monitoring of any interactions between the government and the tobacco industry. Such laws should ideally mandate the kind of interactions that should not be permitted with the tobacco industry, such as attending and participating in industry conferences, or sponsoring them. Any interactions or meetings that the tobacco industry has with government department officials be made public and documented. Further, any lobbying efforts by the tobacco industry should have been made public with tobacco companies having to register lobbyists. These kinds of laws would at least make it very clear to the public that the tobacco industry is interfering with rules and regulations and would not give the government anywhere to hide.

### **(iv) ITIC Conference:**

A more recent event that provided an opportunity for representatives

18. FCTC Implementation Database, Available at <http://apps.who.int/fctc/implementation/database/parties/Cyprus> See Para 3.1.2.5

19. Tobacco Control "Thailand: 'Greatest Tobacco Show has a nasty Shock'", *Tob Control* 2010;19:3, available at <http://tobaccocontrol.bmj.com/content/19/1/3.full>

20. Oswal KC, Pednekar M S, Gupta P.C. Tobacco Industry Interference for Pictorial Warnings: *Indian J. Cancer* 2010; 47 Suppl. S1: 101-4, available at <http://www.indianjcancer.com/text.asp?2010/47/5/101/65318>



from the tobacco industry to interact closely with government officials was the 12<sup>th</sup> Annual Asia Pacific Tax Forum that was organized in New Delhi in May 2015 by ITIC (International Tax and Investment Center). To an outsider there seemed nothing sinister about the motives of the conference which was to focus on issues related to tax administration reforms in India and the implications of tax policies on trade and investment. However, tobacco control activists, who were aware of ITIC's relationship to the tobacco industry could see that the conference was really a disguised forum for discussing tax policies and reforms that were beneficial to the tobacco industry.

The participation of various ministries of the government, including the Ministry of Finance and the Ministry of Health and Family Welfare was challenged in the Delhi High Court in *Institute of Public Health v. Union of India and Ors.*<sup>21</sup> as being in violation of Article 5.3. The petitioners pointed out that while ITIC claimed to be an independent, non-profit research and educational organization that serves as a 'clearinghouse' for best practices in taxation and investment policy, ITIC was in fact a member of the tobacco industry. ITIC's sponsors include all of the leading transnational tobacco companies, and its Board of Directors includes representatives from Philip Morris International, British American Tobacco, Imperial Tobacco and JTI Group (formerly Japanese Tobacco). ITIC materials that are publicly available and internal tobacco industry documents made public through U.S.-based litigation settlements show that ITIC as part of the tobacco industry has worked for more than two decades to undermine tobacco control policies around the world. For example, ITIC had in the past lobbied against increasing taxes on tobacco products and against tackling illicit tobacco trade. Thus, the conference was really a means for the tobacco industry to lobby government officials for tax policies that would work in the industry's favour.

Unfortunately, in contrast to the GTNF case discussed above, the Delhi High Court refrained from directing the government to withdraw its participation from the conference. Here the court distinguished the Karnataka High Court's decision in *The Institute of Public Health v. The State Government of Karnataka* on the basis that the conference was in no way concerned with the use of tobacco and tobacco products. The Court also stated that the FCTC and Article 5.3 did not prohibit parties from participating in conferences co-hosted by the tobacco industry, but only required such interactions in matters of tobacco control or public health to be kept to the minimum.

21. Arun Jitendra and Upendra Bhojani, "How the Tobacco Industry Wins Friends and Influences Policy," dated June 2, 2015, available at <http://www.newslaundry.com/2015/06/02/how-the-tobacco-industry-wins-friends-and-influences-policy/>

22. WP(C) 4402/2015, decided on May 1, 2015.



While this was rather regressive judgment in terms of recognizing India's obligations under Article 5.3 of the FCTC, the government's proposed participation the ITIC conference received much media attention which ultimately caused the Ministry of Finance as well as the World Bank to withdraw their participation from the conference.<sup>22</sup>

Based on the above High Court order in the GTNF case, a draft Code of Conduct was prepared by civil society groups and was circulated within the government. In this draft Code of Conduct, among the recommendations is the prohibition of officials from meeting with members of the tobacco industry in private, and restrict meetings to government buildings or through public hearings, with a voice recording being made of the interaction, which should be made public. In addition, government officials should not directly or indirectly endorse potential partnerships with the tobacco industry.<sup>23</sup> However this draft has still not been approved

## 2. EXAMPLES OF LEGISLATION FROM OTHER COUNTRIES

While there is still no Code of Conduct framed in India for laying down a protocol for interactions of government officials with the tobacco industry, many other countries have framed policies against unnecessary interactions.

### (i) Philippines:

While the Philippines has a high level of tobacco industry interference, it is nevertheless a pioneer in its efforts to curb government interaction with the tobacco industry. The Civil Service Commission and Department of Health, issued a Joint Memorandum Circular No. 2010-01 laying down a Policy on the Protection of the Bureaucracy against Tobacco Industry Interference, aimed at providing specific guidelines to all government officials and employees for interactions with the tobacco industry based on Article 5.3 of the FCTC.<sup>24</sup> Under this Policy, the interaction of public officials and government employees with the tobacco industry is strictly limited and transparency is mandated for all permitted interactions. Where there are any interactions of public officials with the tobacco industry, there is a detailed Code of Conduct prescribed as to how such interactions should be conducted so as to ensure full transparency about the agenda of the meeting, where the meeting is held, who is part of the meeting and the minutes of the meeting so as to ensure that there is no conflict of interest. Public officials are prohibited from giving any incentives to the tobacco industry, accepting gifts, donations, sponsorship, or favours from the tobacco industry. Public officials and

23. "World Bank Exits Event Funded by Tobacco Companies," Times of India, May 2, 2015.

24. "Tobacco Control: Code of Conduct Proposed" <http://www.thehindu.com/todays-paper/tp-national/tobacco-control-code-of-conduct-proposed/article2099832.ece>

25. Joint Memorandum Circular No. 2010-01 issued by the Civil Service Commission and the Department of health of the Republic of Philippines, available at:



employees are restrained from having any financial interest in any transaction involving the tobacco industry and also those employees that were engaged in implementing public health policies are required to inform the government of any engagement with the tobacco industry even after they leave government service. Thailand and Lao PDR also have a similar policy for their Ministry of Health.<sup>25</sup>

**(ii) Australia:**

In Australia, the Government Department of Health and Ageing posts public health notifications of any meetings it has with the tobacco industry on its website.<sup>26</sup> Similarly, the Taxation Office posts on its website minutes of meetings it holds with tobacco stakeholder groups.<sup>27</sup> Australia also has a Lobbying Code of Conduct which ensures that interactions between lobbyists and Government representatives are conducted transparently.<sup>28</sup> A searchable public register of lobbyists is posted online, which identifies registered lobbyists, their clients, and whether they were former government representatives. Lobbyists from certain tobacco companies are registered.<sup>29</sup>

**(iii) Gabon:**

In Gabon, there is a ban on direct and indirect partnerships between government and the tobacco industry.<sup>30</sup>

**(iv) United Kingdom:**

The United Kingdom government has committed to transparency in all of its dealings with the tobacco industry, including by publishing details of any policy related meetings between the tobacco industry and government departments (excluding meetings to reduce illicit trade in tobacco and bilateral meetings between the tobacco industry and HM Revenue and Customs).<sup>31</sup> Further, any individuals who are invited for consultations with the Department of Health are asked to disclose any interests or links to the tobacco industry.

**(v) Canada:**

The Lobbying Act of Canada<sup>32</sup> ensures that all government-industry interactions are conducted transparently. It provides an example of documentation requirements imposed on individuals or organizations undertaking any communication or seeking a meeting with public officers in an effort to influence policy. The Lobbying Act can thus be used to

26. [www.seatca.org/dmdocuments/SEATCA-TII%20Index%20Report.pdf](http://www.seatca.org/dmdocuments/SEATCA-TII%20Index%20Report.pdf)

27. Public Notification of meetings between the Australian Government Department of Health and the Tobacco Industry, Available at <http://www.health.gov.au/internet/main/publishing.nsf/Content/tobacco-conv-public>

28. Last Visited September 4, 2015.

29. Tobacco Stakeholder Group Record of meeting, Available at <https://www.ato.gov.au/General/Consultation/In-detail/Stakeholder-relationship-and-management-groups---minutes/Tobacco-Stakeholder-Group/Tobacco-Stakeholder-Group---Meeting-23-October-2014---Minutes/>

30. Australian Government Lobbying Code of Conduct, available at [http://lobbyists.pmc.gov.au/conduct\\_code.cfm](http://lobbyists.pmc.gov.au/conduct_code.cfm).

31. Australian Government Register of Lobbyists, available at [http://lobbyists.pmc.gov.au/who\\_register.cfm](http://lobbyists.pmc.gov.au/who_register.cfm).

32. Law No. 006/2013 of August 21, 2013, concerning the enactment of measures supporting the campaign for tobacco control in the Republic of Gabon, Chapter 7,



ensured to ensure that government-tobacco industry interactions are conducted transparently.

**(vi) OECD:**

The OECD lobbying disclosures<sup>33</sup> require registration of lobbyists, information on lobbyists, lobbying, the ordering party and other beneficiaries, and target public offices; funding sources; and disclosure by the government regarding lobbyist consultation on legislative initiatives.

Hence it is crucial that there is an immediate adoption of a code of conduct in India for laying down a protocol on how government officials can interact with the tobacco industry. As Dr Bhojani has commented, "This sort of nexus between the government and industry is very detrimental to the government's efforts as it opposes the commendable steps taken in tobacco control."<sup>34</sup> Such a code of conduct would be mandated under the obligations of Article 5.3 of the FCTC.

33. See OECD Principles for Transparency and Integrity in Lobbying, Principles 5, 6

34. <http://blogs.rediff.com/the-bravepedestrian/2011/07/07/code-of-conduct-to-guide-govt-officials-interactions-with-tobacco-industry/>



# PREFERENTIAL TREATMENT TO THE TOBACCO INDUSTRY

## BACKGROUND

One of the main guiding principles in the Guidelines to Article 5.3 is Principle 4, which states that, "Because their products are lethal, the tobacco industry should not be granted incentives to establish or run their business." It further states that "any preferential treatment of the tobacco industry would be in conflict with tobacco control policy." Therefore any incentives provided by governments to the tobacco industry such as subsidies and incentives to tobacco farmers, tax cuts and tax exemptions and other benefits would amount to a violation of Article 5.3 as they are incentives to the tobacco industry.

### 1. PREFERENTIAL TREATMENT IN INDIA

#### (i) Subsidies and Incentives:

The Tobacco Board, set up under the Tobacco Board Act 1976, offers subsidies and other incentives for tobacco farmers growing the flue cured variety of tobacco. These subsidies include the supply of inputs, farm mechanisms, fertilizers and equipment for improving yield and quality of tobacco, improving of curing practices, and extension programs to help produce quality crop that attracts remunerative prices. In 2012 – 13 the Tobacco Board provided subsidies for tobacco cultivation in the tune of about Rs. 3.73 crores.<sup>35</sup> The Tobacco Board has also developed the concept of Good Agricultural Processes or GAP under which it extends subsidies of certain inputs to farmers in lands identified as "model project areas" in order to convert and enhance productivity in these lands. Such provision of subsidies and incentives for tobacco cultivation by the Tobacco Board amounts to granting preferential treatment of the tobacco industry in violation of the Article 5.3 Guidelines and in particular Recommendation 17(7) under the Guidelines.

Further it presents an obvious conflict of interest between different departments of the Union Government. While the Ministry of Health and Family Welfare takes measures to reduce the demand and supply of tobacco in the interests of public health, the Ministry of Commerce and Industry, through the Tobacco Board, provides subsidies and incentives for tobacco cultivation.

35. Tobacco Board. Annual Report 2012-13 [Internet] available at [http://tobaccoboard.com/admin/publicationsfiles/AR\\_2012\\_2013\\_Eng.pdf](http://tobaccoboard.com/admin/publicationsfiles/AR_2012_2013_Eng.pdf)



The Tobacco Board's provision of subsidies and incentives was challenged in the Karnataka High Court in *Cancer Patients Aid Association v. State of Karnataka*.<sup>36</sup> The petitioners sought the cessation of subsidies as being in violation of Article 5.3 and that the State and Central Governments instead provide support and rehabilitation for tobacco farmers in switching to alternative crops. In this petition the Karnataka High Court passed directions to the Central and State Governments to reconsider the policy decision to continue subsidies and incentives to for the production of tobacco for local consumption and to tobacco farmers and related workers.<sup>37</sup>

## **(ii) Tax cuts:**

Recently, the Rajasthan government slashed the VAT on tobacco. In orders passed in June 2015, the Rajasthan state government reduced VAT on "tobacco and its products excluding bidi" to 45 per cent, from the existing 65 per cent, saying it was "expedient to do so in public interest". On pan masala too, VAT was reduced to 35 per cent from 65 per cent. However, the existing 65 per cent VAT on bidis has been left unchanged. These orders on tax cuts have been stayed by the Rajasthan High Court.<sup>38</sup> Such tax benefits amount to providing preferential treatment to the tobacco industry under Article 5.3 of the FCTC.

36. *Cancer Patients Aid Association v. State of Karnataka*, (W.P. NO. 17958/2009), decided on 29.03.2011.

37. *Ibid.*

38. *Rahul Joshi v. Union of India & Ors.*, W.P. No. 8680/2015, Rajasthan High Court, order dated 03.07.2015.

39. European Commission website, available at [http://ec.europa.eu/health/tobacco/other/index\\_en.htm](http://ec.europa.eu/health/tobacco/other/index_en.htm)

## **EXAMPLES FROM OTHER JURISDICTIONS**

While tobacco subsidies in India are still being continued, in many other parts of the world, tobacco subsidies have been discontinued. In the European Union for example, tobacco subsidies were once an important but controversial part of the EU's agricultural policy. In the interest of public health, direct tobacco subsidies have been phased out.<sup>39</sup> However subsidies to tobacco farmers by certain European countries are still being given.

In the United States there were large tobacco subsidies being given to tobacco farmers. In 2004 however, the Fair and Equitable Tobacco Reform Act was passed which ended the price support program for tobacco farmers and established the Tobacco Transition Payment Program (Farm Service Agency, 2008). The payments from the program began in 2005 and ended in 2014. Under this program, tobacco growing subsidies were stopped and instead fixed payments were to go out to eligible tobacco quota holder and producers.



## CONCLUSION

Preferential treatment for the tobacco industry is still a sensitive issue in many jurisdictions, especially in matters concerning subsidies to tobacco farmers, as these are seen as means to support the livelihood of farmers. In India too, similar arguments are made by the tobacco industry to the government to resist any discontinuance of tobacco subsidies, and for better tax cuts and incentives. However, such measures pose a direct conflict of interest as they serve to incentivize tobacco growing and selling and ultimately tobacco consumption and also a serious violation of Article 5.3 of the FCTC. Instead however, the FCTC itself mandates in Article 17 that parties shall in cooperation with each other and with competent international and regional intergovernmental organizations, promote, as appropriate, economically viable alternatives for tobacco workers, growers, and as the case may be, individual sellers.



## CHAPTER 2

# CONFLICTS OF INTEREST FOR PUBLIC OFFICIALS AND GOVERNMENT EMPLOYEES

## BACKGROUND

Recommendation 17(4) of the Article 5.3 Guidelines deals specifically with "avoiding conflicts of interests for public officials and government employees." This recommendation is based on the principle that the involvement of organizations with commercial or vested interests in the tobacco industry in public health policies on tobacco control is most likely to have a negative effect. Thus, all efforts should be made to ensure that those involved in formulating or implementing public health policies on tobacco control should not under any circumstances be influenced by the tobacco industry in any way. The Guidelines further define circumstances where conflicts of interests may arise to include "payments, gifts and services, monetary or in-kind, and research funding offered by the tobacco industry to government institutions, officials or employees."<sup>40</sup>

40. [http://www.who.int/fctc/guidelines/article\\_5\\_3.pdf](http://www.who.int/fctc/guidelines/article_5_3.pdf)

To a certain extent all of Article 5.3 deals with conflicts of interest as the overall purpose of Article 5.3 is to protect public health policies from getting derailed as a result of the vested interests of the tobacco industry. Recommendation 17(4) is, thus, one of the most of the most detailed in terms of providing implementing guidelines for State parties as it forms the core of Article 5.3. The implementing guidelines include a range of measures that parties must take to avoid conflicts of interest and manage those that cannot be avoided. These include, among other things:

- Having a policy on the disclosure and management of conflicts that applies to all persons involved in setting and implementing public health policies with respect to tobacco control, including government officials, employees, consultants and contractors;
- Implementing a code of conduct for public officials when dealing with the tobacco industry;
- Having a clear policy regarding public officials who have worked on tobacco control not being allowed to be involved in the tobacco industry for a period of time after leaving service;
- Taking care to ensure that contracts for implementing public health policies are not awarded to those with tobacco industry links;



- Ⓒ Prohibiting government institutions and individuals within government from having a financial interest in tobacco companies;
- Ⓒ Not allowing any person associated with the tobacco industry to be a member of any government body, committee or advisory group that sets or implements tobacco control or public health policy and prohibiting government officials from accepting contributions, gifts or services of any kind from the tobacco industry.<sup>41</sup>

## 1. Types of Conflicts of Interest

Conflicts of interest for government and government employees that could hinder or influence effective policy making and implementation on tobacco control takes different forms. The four most common types of conflicts are discussed below.

### (i) Governments having a Financial Interest in Tobacco Companies:

Tobacco companies in several parts of the world are increasing their profitability and market share.<sup>42</sup> For this very reason, governments and, particularly government owned or controlled funds, such as pension funds, find investments in tobacco companies to be secure and financially rewarding. Needless to say, this presents an obvious conflict of interest as a financial investor has an interest in seeing the profits and, as a consequence, the value of its investments, in a company increase. The goals of tobacco companies and their investors would, thus, be in fundamental conflict with a government's public health goals of reducing the demand and supply of tobacco products. A government's investment in tobacco companies is often hidden through multiple layers of entities and funds and may not always be apparent. Yet, in order for state parties to ensure that States Parties' tobacco control policies are not in any influenced or give the perception of being influenced by its financial interests in tobacco companies, all such investments and financial interests however remote should be prohibited.<sup>43 44</sup>

### (ii) Conflicts of Interest for Public Officials and Employees:

As the Article 5.3 Guidelines make clear, it is imperative that public officials who are involved in the formation and implementation of public health policies with respect to tobacco control be free of any vested interests. One common reason that could cause such public officials and employees to be conflicted are their links (past or present) with the tobacco industry. For example, just as governments may have financial interests in tobacco companies, individuals in the government may also own shares in these companies. An even more obvious conflict is

41. Article 5.3 Guidelines, available at [http://www.who.int/fctc/guidelines/article\\_5\\_3.pdf](http://www.who.int/fctc/guidelines/article_5_3.pdf)

42. "The Global Market: Trends Affecting our Industry", British American Tobacco available at, [http://www.bat.com/group/sites/UK\\_\\_9D9KCY.nsf/vwPagesWebLive/DO9DCKFM](http://www.bat.com/group/sites/UK__9D9KCY.nsf/vwPagesWebLive/DO9DCKFM)

43. Why govt should get rid of its stake in tobacco co ITC," F. Business, FirstPost available at, <http://www.firstpost.com/business/why-govt-should-get-rid-of-its-stake-in-tobacco-co-itc-264262.html>

44. D.M. Cain *et al*, "The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest," 34(1) The Journal of Legal Studies 1 (January, 2005), available at [http://www.jstor.org/stable/10.1086/426699?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/10.1086/426699?seq=1#page_scan_tab_contents)



when public officials and government employees might have previously worked in the tobacco industry. Popularly known as the "revolving door phenomenon," the tobacco industry is constantly on the lookout for individuals within government who have an association with the tobacco industry.

Such connections need to be identified and strictly regulated for two reasons. First, individuals with ties to the tobacco industry may tend to be more sympathetic to the concerns of the industry, which might influence their policy making or implementation. Secondly, tobacco companies may exploit their prior relationships and contacts with such individuals to gain entry into government decision making circles on tobacco control, similar to having an industry representative in the government. The prevalence of the revolving door is well known and it is for this reason that the United Nations Convention Against Corruption provides for imposing restrictions for a reasonable period of time after leaving government services, on the professional activities of former public officials.<sup>45</sup>

### (iii) Institutional Conflicts:

The third kind of conflict deals with various situations where the government or various government institutions may have vested interests in satisfying the demands of the tobacco industry. The most obvious example of this would be when political parties accept contributions from tobacco companies. Another more nuanced technique is when representatives from the tobacco industry or their delegates find their way into government policy making circles. This happens, for example, when a government constituted committee to look into improving the implementation of tobacco regulation includes current or former executives from the tobacco industry. Representatives from the tobacco industry often enter these committees under the guise as "industry" experts, but their effect has typically been to water down or derail proposals for tobacco regulation. A statement by the British Medical Association in response to the UK government's strategy of engaging with industry bodies through partnerships and voluntary codes to promote lifestyle changes aimed at improving public health noted: "The conflict of interests engaged with powerful commercial players have influence over public health policies raises serious doubts as to the effectiveness and viability of voluntary partnerships with industry in working towards public health goals."<sup>46</sup>

45. United Nations Convention against Corruption, United Nations Organization, available at, [http://www.unodc.org/pdf/crime/convention\\_corruption/signing/Convention-e.pdf](http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf)

46. "Behaviour Change, Public Health and the Role of the State – BMA Position Statement, December 2012, available at [bma.org.uk/-/media/files/pdfs/.../behaviourchangestatement2012.pdf](http://bma.org.uk/-/media/files/pdfs/.../behaviourchangestatement2012.pdf)



Another common ploy of the tobacco industry is to fund scientific research on the harms of tobacco use. This strategy of the tobacco industry, which began as early as the 1950s has been well documented by Alan Brandt, who brought to light the tobacco industry's use of sophisticated public relations techniques to distort and undermine scientific evidence of the harms of tobacco use: "The industry campaign worked to create a scientific controversy through a program that depended on the creation of industry-academic conflicts of interest. This strategy of producing scientific uncertainty undercut public health efforts and regulatory interventions designed to reduce the harms of smoking."<sup>47</sup>

**(iv) Policy Conflicts:**

The final type of conflict worth noting is where the government's own policies or laws are at odds with the overall public health priority of reducing tobacco use and achieving more effective implementation of tobacco control laws. This happens where laws or policies actually work to the advantage of the tobacco industry such as a law that reduces taxes on tobacco products or grants concessions to the tobacco industry. As noted below, several such policy conflicts do exist in India despite the ratification of the FCTC.

**Conflicts of Interest for Government and Government Officials in India**

India currently has no law or policy to address the various levels of conflicts of interest described above. The very existence of the Tobacco Board and the Tobacco Board Act discussed in the previous chapter, represent a policy-level conflict as it involves a body set up by the Union Government to promote the development of the tobacco industry. The Union Government also funds the Central Tobacco Research Institute, an institute under the control of the Indian Council for Agricultural Research that aims to enhance the quality and yield of tobacco crop.<sup>48</sup> State governments, particularly in tobacco producing states such as Gujarat, Andhra Pradesh and Karnataka also own or fund tobacco companies and research stations. Other examples that reflect conflicts of interest are described below:

**(i) Stakes in Tobacco Companies**

The Indian Government holds a major stake in a tobacco company Indian Tobacco Company<sup>49</sup> through one of its institutional heads called the Life Insurance Corporation.<sup>50</sup> It holds shares worth 3500 crores in ITC and a cumulative of 50.15 crores in other tobacco companies such as VST Industries and Dharampal Satyapal Ltd.<sup>51</sup>

47. Allan M Brandt, "Inventing Conflicts of Interest: A History of Tobacco Industry Tactics," *Am J Public Health*. 2012 January; 102(1): 63-71.

48. Central Tobacco Research Institute website <http://www.ctri.org.in/index.php>

49. Why govt should get rid of its stake in tobacco co ITC, F. Business," *First Post* available at, <http://www.firstpost.com/business/why-govt-should-get-rid-of-its-stake-in-tobacco-co-etc-264262.html>

50. "RTI Reveals LIC's Huge Investment in Tobacco Companies," *The Indian Express* (October 15<sup>th</sup>, 2011), available at <http://archive.indian-express.com/news/rti-reveals-lic-s-huge-investment-in-tobacco-companies/860153/>

51. Tobacco Industry Profile- India," *Campaign for Tobacco-Free Kids* (December 2010) available at [http://global.tobaccofreekids.org/files/pdfs/en/TI\\_Profile\\_20India\\_Final.pdf](http://global.tobaccofreekids.org/files/pdfs/en/TI_Profile_20India_Final.pdf)



### (ii) Public Officials with Vested Interests

Many Ministers, Members of Parliament and Members of State Legislatures and their families have financial interests in tobacco companies while simultaneously having a say in tobacco-related policies of the government. A well-reported example is Mr. Praful Patel, former Union Minister (2004-2014) referred to as 'bidi king'. Other examples are tobacco exporter Magunta Srinivasulu Reddy and areca nut trader GM Siddeshwara who were simultaneously members of the Standing Committee on Finance in 2009 – 2010.<sup>52</sup>

A more recent example was the case of the Parliamentary Committee on Subordinate Legislation that was mandated with studying the new Packaging Rules discussed in Chapter 1. When the implementation of the new Packaging Rules was being discussed, it came to light that one of the members of the Committee on Subordinate Legislation, Mr. Shyam Charan Gupta, was the owner of a major bidi company, which has been in business for three-four decades.<sup>53,54</sup> It is perhaps not a coincidence that he stated that there was no evidence that tobacco products caused cancer!<sup>55</sup>

Yet another case was that of Mr Venkaiah Naidu, the Minister for Parliamentary Affairs who is part of the beedi industry and also a member of a sub-committee of the Tobacco Board.<sup>56</sup> In November 2014, the Union Ministry of Health and Family Welfare announced that it would implement an amendment to COTPA to ban the sale of loose cigarettes. However, in a case similar to that of the pack warning debacle, Mr Naidu called an inter-ministerial conference, the chief objective of which was to urge the Health Ministry to reconsider its decision. Others in the meeting were the Chemicals and Fertiliser Minister, Minister of State (MoS) for Commerce and Industry, MoS for Agriculture and some MPs from Andhra Pradesh and Karnataka, the top two tobacco producing states in India. Terming the Health Ministry's decision as a "hasty step", the Ministers pointed out that several farmers' livelihood depended on tobacco, a cash crop. The meeting ended with the Health Minister agreeing to put his recommendation for ban on hold until the issue on alternative cash crops was resolved.<sup>57</sup>

### (iii) Government Partnerships with Tobacco Companies

A recent ploy of the tobacco industry has been to partner with governments and government departments on civic issues that appear unrelated to tobacco control. Such partnerships often serve to promote the brand image of a tobacco company and also provide tobacco industry representatives with easy access to policy makers and

52. Composition of Standing Committee on Finance 2009 – 2010, available at [http://164.100.47.134/lssccommittee/Finance/25th\\_Report\\_%20ICWAI.pdf](http://164.100.47.134/lssccommittee/Finance/25th_Report_%20ICWAI.pdf)

53. Ghosh, Abantika. 2015. "MP Shyama Charan Gupta who said nothing wrong with beedis flaunts his beedi empire." *The Indian Express*, April 2, 2015, available at <http://indianexpress.com/article/india/india-others/mp-shyama-charan-gupta-who-said-nothing-wrong-with-beedis-flaunts-his-beedi-empire/>

54. Gupta, a Member of Parliament representing the ruling Bharatiya Janata Party, is the owner of the *Shyam Group*, of which the *bidi* company, Shyam Bidi Works, is one of the core ventures.

55. S. Kumar, "Beedi Business Owner, Tobacco Panel Member Shyama Charan Gupta Questions Cancer Link," *Hindustan Times* (April 2, 2015) available at <http://www.hindustantimes.com/india-news/bidi-industry-owner-to-bacco-panel-member-shyam-charan-gupta-questions-cancer-link/article1-1333279.aspx>

56. Abantika Ghosh, "Conflict of Interest: Venkaiah Naidu Frowns, So Does Tobacco Panel," *The Indian Express* (April 7, 2015) available at <http://indianexpress.com/article/india/india-others/tobacco-warnings-conflict-of-interest-must-be-declared-says-venkaiah/>

57. Ban on Loose Cigarette Sale: Health Minister JP Naidu Urged to Resolve Issues," *The Economic Times* available at [http://articles.economictimes.indiatimes.com/2014-12-03/news/56684893\\_1\\_health-minister-jp-nadda-cigarettes-overall-to-bacco-consumption](http://articles.economictimes.indiatimes.com/2014-12-03/news/56684893_1_health-minister-jp-nadda-cigarettes-overall-to-bacco-consumption)



government officials. Some examples of such partnerships include:

- C** The Bengaluru Municipal Corporation (BBMP), which hosts the anti-tobacco cell for Bengaluru urban district itself partnered with India's top cigarette manufacturer ITC Ltd for a "Zero Garbage Project."<sup>58</sup>
- C** In 2011, the Government of Meghalaya signed an MoU with the Dharmpal Satyapal (DS) Group for setting up cement plants in Meghalaya, which was the first such contract in the cement industry for the DS Group. The DS Group is India's leading manufacturer of smokeless tobacco products.<sup>59</sup>

## 2. Political Contributions

There is evidence that large tobacco companies regularly make contributions to political parties. For example, the profit and loss accounts of the Indian Tobacco Company Ltd. for the 2012 – 13 financial year revealed that it had made large political contributions amounting to nearly Rs. 6 crores (60 million) to a number of political parties.<sup>60</sup>

### Examples from Other Jurisdictions

Many countries have brought about Codes of Conduct and legislation to govern conflicts of interest for government and government officials. These include mandatory codes of conduct for public officials to follow to minimize and manage conflicts of interest in the discharge of their official duties, laws and policies rejecting monetary donations and divesting any existing funds in the tobacco industry. Some of the popular mechanisms implemented by other countries are as follows:

#### (i) Laws Addressing Conflicts of Interest for Government Officials and Employees:

##### a. Canada

Canada's Conflict of Interest Act, 2006<sup>61</sup> contains provisions to govern conflicts of interest for public officials during the period in which they are in office. The Act also specifically addresses the revolving door phenomenon by placing employment and other restrictions on public officials for a one year period after they have left office.

58. "12 Wards to Go Zero Garbage from Today," The Hindu, July 1, 2013, available at <http://www.thehindu.com/news/cities/bangalore/12-wards-to-go-zero-garbage-from-today/article4868628.ece>

59. "Govt to Launch two Cement Projects in State," Eastern Chronicle, April 5, 2011, available at <http://www.dsgroupindia.com/press-coverage-detail.aspx?id=40>

60. <http://www.tribuneindia.com/2012/20120604/main2.htm>

61. Available at <http://laws-lois.justice.gc.ca/PDF/C-36.65.pdf>



Section 6 of the Act requires that public officials should not participate in decision making in connection with the discharge of their official duties where he or she knows or should reasonably know that participating in the decision making would place him or her in a conflict of interest. Similarly, Section 6 of the Act prohibits ministers and parliamentary secretaries from voting or debating a question in the Senate or the House of Commons that would place him or her in a conflict of interest.

The Act also prohibits public office bearers from having an interest with a private entity that has contract with the government. Section 8 of the Act prohibits a minister of the Crown, a minister of state or parliamentary secretary from having an interest in "a partnership or private corporation that is a party to a contract with a public sector entity under which the partnership or corporation receives a benefit."

In order to minimize the possibilities of conflicts of interest for public officials, Section 15 of the Act prohibits public office bearers from the following activities:

- Ⓒ engage in employment or the practice of a profession;
- Ⓒ manage or operate a business or commercial activity;
- Ⓒ continue as, or become, a director or officer in a corporation or an organization;
- Ⓒ hold office in a union or professional association;
- Ⓒ serve as a paid consultant; or
- Ⓒ be an active partner in a partnership.

#### **Restrictions Post and Pre-Employment in Public Office:**

The Act provides that after leaving office, a public official may not act in any manner so as to take advantage of his or her prior public office.<sup>62</sup> Further, the law also addresses the problem of the revolving door phenomenon by placing employment and other restrictions on public officials for a one year period after they leave office. Section 35(1) of the Act provides that a former public officer holder may not enter into a contract for service, accept a board appointment or employment with "an entity with which he or she had direct and significant official dealings during the period of one year immediately before his or her last day in office."

62. Conflict of Interest Act, 2006, Section 33, available at <http://laws-lois.justice.gc.ca/PD-F/C-36.65.pdf>



**b. Serbia**

Serbia has detailed legislation on preventing conflicts of interest for public officials which requires public officials to notify of any conflicts of interest they may have before taking part in any debate or voting on a matter.<sup>63</sup> Public officials are also prohibited from having affiliations with business enterprises while in office, including board memberships.<sup>64</sup>

While both the Canadian and Serbian laws are laws of general application and not aimed specifically at the tobacco industry, these provisions can be helpful in monitoring tobacco industry links of government officials and elected representatives. The Serbian law is weaker than the Canadian law in that it only requires disclosure of conflicts rather than prohibiting government officials with conflicts from taking part in the debate or vote on a particular issue on which they might be conflicted.

**c. Kenya**

In Kenya, the Tobacco Control Act, 2007 prohibits any member of the Tobacco Control Board to be directly or indirectly affiliated to the tobacco industry or its subsidiaries.<sup>65</sup> Article 5 (3) states that no member of the Board shall directly or indirectly be affiliated to the tobacco industry or its subsidiaries while Article 5(4) states that a member who fails to disclose his or her affiliation to the tobacco industry or its subsidiary has committed an offence and shall be liable, on conviction, to a fine not exceeding one million shillings or imprisonment for a period not exceeding five years or both.

**d. Namibia**

Under Article 5 of the Tobacco Products Control Act, 2010, a member of the Tobacco Products Control Committee must not be "an employee, employer, director, member or trustee of any business, company, close corporation or trust involved in the tobacco industry in any way" or have any shares in any business, company, close corporation or trust involved in the tobacco industry."<sup>66</sup>

**e. Portugal**

Portugal has a law similar to Namibia which requires that Members of the National Scientific Tobacco Prevention Board cannot have any affiliation with the tobacco industry. The Tobacco Law that entered into force on the January 1, 2008 prohibits the tobacco industry from making information campaigns. The tobacco industry cannot sponsor any activities that directly or indirectly promote a tobacco product. In 2013, the General Directorate of Health published guidelines for the

63. Law on Prevention of Conflict of Interest in Discharge of Public Office, 2008, Article 7, available at [http://www.aaci-india.org/Resources/Serbia35\\_\\_law\\_on\\_conflict\\_of\\_interest.pdf](http://www.aaci-india.org/Resources/Serbia35__law_on_conflict_of_interest.pdf)

64. Ibid., Article 9.

65. Tobacco Control Act, 2007, <http://www.tobaccocontrolaws.org/files/live/Kenya/Kenya%20-%20Tobacco%20Control%20Act%20-%20national.pdf>

66. Tobacco Products Control Act, 2010 (Act No. 1 of 2010), Article 5, <http://www.tobaccocontrolaws.org/files/live/Namibia/Namibia%20---%20Tobacco%20Products%20Control%20---%20national.pdf>.



implementation of smoking prevention initiatives at population level. The guidelines require these initiatives to be protected from conflict of interests with the tobacco industry.<sup>67</sup>

## Laws Restricting Political Contributions from the Tobacco Industry

### a. Tasmania

In November 2012, Tasmania passed an Electoral Amendment Bill, 2012, which makes it unlawful for a tobacco manufacturer or wholesaler to make a gift to or on behalf of them to a political party, candidate etc. It is also unlawful for a political party to accept such a gift from the tobacco industry.<sup>68</sup> Section 157D of the amended Electoral Act provides:

Section 157D - Political donations by tobacco industry business entities unlawful:

- (1) A tobacco industry business entity must not make a political donation.
- (2) A person must not accept a political donation on behalf of a tobacco industry business entity.
- (3) A person must not accept a political donation that was made (wholly or partly) by a person on behalf of a tobacco industry business entity.
- (4) A tobacco industry business entity must not solicit another person to make a political donation.
- (5) A person must not solicit another person on behalf of a tobacco industry business entity to make a political donation.

### b. Kosovo

In Kosovo, government departments and political parties and candidates are prohibited from accepting any form of voluntary contributions from the tobacco industry.<sup>69</sup>

### c. Serbia

While other countries do not have blanket prohibitions on the tobacco industry making political contributions, they do place restrictions on contributions from the tobacco industry being used for tobacco control measures. For example, Serbia's Tobacco Control Strategy adopted in January 2007<sup>70</sup> discusses the importance of securing adequate and sustainable funding for tobacco control measures, but makes clear that

68. Available at [http://www.parliament.tas.gov.au/bills/Bills2012/reprint/12\\_of\\_2012.pdf](http://www.parliament.tas.gov.au/bills/Bills2012/reprint/12_of_2012.pdf)

69. Law No. 04/L-156 on Tobacco Control, Article 16 (Prohibition of Voluntary Contributions from the Tobacco Industry), available at <http://www.tobaccocontrollaws.org/files/live/Kosovo/Kosovo%20-%20TC%20Law%202013.pdf>

70. Tobacco Control Strategy, available at [http://apps.who.int/fctc/implementation/database/sites/implementation/files/documents/reports/r\\_serbia\\_annex5\\_tobacco\\_control\\_strategy\\_eng.pdf](http://apps.who.int/fctc/implementation/database/sites/implementation/files/documents/reports/r_serbia_annex5_tobacco_control_strategy_eng.pdf)



the tobacco industry cannot fund any of these measures. Section 4.4 of the Tobacco Control Strategy that deals with financing states:<sup>71</sup> "However, by no means, partnership and direct funding from the tobacco industry for implementation of tobacco control activities will be accepted."

## (ii) Laws on Government Stakes in the Tobacco Industry

### a. Norway

As part of a larger strategy of divesting state funds from the tobacco industry, state pension funds in Norway are prohibited from making investments in the tobacco industry. In its Government Whitepaper no. 20 (2008-2009), the Ministry of Finance proposed that tobacco companies should be excluded from the investment universe of the Government Pension Fund Global. The proposition was supported by Stortinget (the Parliament). In line with this, the Ministry has changed the Fund's ethical guidelines to the effect that companies which produce tobacco are to be excluded from the Fund. Section 2(b) of the Guidelines (Criteria for product-based exclusion of companies) states that the Fund shall not invest in companies "which themselves or through entities they control produce tobacco."<sup>72</sup>

### b. Australia

The Australian Federal Government's multi-billion-dollar Future Fund has decided to get rid of its investment in tobacco companies, following a long campaign by health groups.<sup>73</sup> Australia's National Tobacco Strategy (2012-18)<sup>74</sup>, agreed to by all nine Australian Federal, State and Territory governments, commits them to implement the FCTC treaty article (Article 5.3) on preventing tobacco industry interference – including not investing in tobacco.

### c. New Zealand<sup>75</sup>

The Government Superannuation Fund Authority's Responsible Investment Policy prohibits the fund from making direct investments in the tobacco industry. The policy lists tobacco as one of the excluded investments stating that<sup>76</sup> active involvement in the production of tobacco or tobacco products, which is inconsistent with the World Health Organisation Framework Convention on Tobacco Control, to which New Zealand is a party, and the New Zealand Government's antismoking laws. The exclusion covers companies comprising the MSCI World Equity Index Global Industry Classification Standard for Tobacco.

71. Tobacco Control Strategy, p. 21.

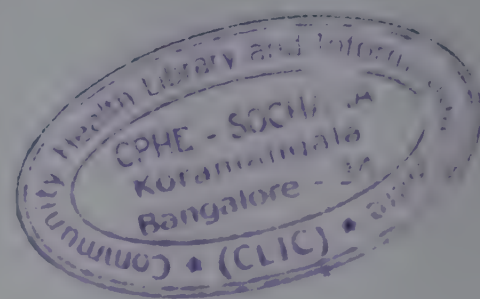
72. See <https://www.regjeringen.no/globalassets/upload/fin/statens-pensjonsfond/guidelines-for-observation-and-exclusion-14-april-2015.pdf>

73. See, <http://www.smh.com.au/federal-politics/political-news/future-fund-quits-tobacco-investment-20130228-2f7yb.html>; see also: <http://www.abc.net.au/news/2013-02-28/future-fund-drops-tobacco-investment/4545328>

74. [http://www.nationaldrug-strategy.gov.au/internet/drug-strategy/publishing.nsf/Content/D4E3727950BDBAE4CA257AE-70003730C/\\$File/National%20Tobacco%20Strategy%202012-2018.pdf](http://www.nationaldrug-strategy.gov.au/internet/drug-strategy/publishing.nsf/Content/D4E3727950BDBAE4CA257AE-70003730C/$File/National%20Tobacco%20Strategy%202012-2018.pdf)

75. Superannuation Fund Authority – Responsible Investment Guidelines, available at <http://www.gsfa.govt.nz/content/f9c63cd9-53c7-432e-86f4-db85e69d8965.cmr> (Refer to Page 15 [8.2-Standards]).

76. <http://www.gsfa.govt.nz/content/ef29579f-923d-4d5c-93b3-f2fdfe2f25b9.html>



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#### d. Canada

The government of Alberta province in Canada had directed the Alberta Investment Management Corporation (AIMCo) to sell-off its direct ownership of tobacco companies.<sup>77</sup> However, the Canada Pension Plan Investment Board (CPPIB) has not excluded the tobacco industry from its list of investments (in industries).

#### e. Hong Kong

In 2012, the Hong Kong Monetary Authority committed to divesting from the tobacco industry in order to comply with the Article 5.3 Guidelines.<sup>78</sup> The Hong Kong Mandatory Provident Fund Schemes Authority followed shortly thereafter with a similar commitment. In order to implement this commitment the HMA also instructed all of its contractors to divest from and refrain from investing in the tobacco industry.

### CONCLUSION

Ties between government officials and the tobacco industry as well as cases of governments having stakes in the tobacco industry or accepting contributions and partnerships with the tobacco industry continue to exist in many countries despite the clear recommendations in the Article 5.3 Guidelines. However, some countries have sought to prevent or minimize these conflicts through legislation and policies. In India there are numerous examples of these conflicts and, at present, there are no laws in place to guard against them. There is a pressing need to develop a conflicts of interest code for public officials and those in government that are involved in tobacco control to ensure that their decisions on framing and implementing tobacco control laws and policies are not influenced by their ties with the tobacco industry. Similarly, the government too needs to have laws and policies that prohibit investments in the tobacco industry and prohibit government departments from entering into any sort of partnership with the tobacco industry.

77. [http://www.smoke-free.ca/eng\\_home/2011/news\\_press\\_20\\_October\\_2011.htm](http://www.smoke-free.ca/eng_home/2011/news_press_20_October_2011.htm)

78. Communication from Hong Kong Monetary Authority to Clear Air NGO and Charity, February 2, 2012, <http://tobacco.cleartheair.org.hk/wp-content/uploads/2012/02/Clear---the---Air---e.pdf>.



# REGULATING CSR ACTIVITIES OF TOBACCO COMPANIES

## BACKGROUND

One of the recommendations in the Article 5.3 Guidelines to tackle the tobacco industry's interference in public health policies focuses on regulating the corporate social responsibility or "CSR" activities of tobacco companies. It urges state parties to "Denormalize and, to the extent possible, regulate activities described as "socially responsible" by the tobacco industry, including but not limited to activities described as "corporate social responsibility"". The following detailed recommendations are then given in the guidelines for implementation of Article 5.3:

1. Parties should ensure that all branches of government and the public are informed and made aware of the true purpose and scope of activities described as socially responsible performed by the tobacco industry.
2. Parties should not endorse, support, form partnerships with or participate in activities of the tobacco industry described as socially responsible.
3. Parties should not allow public disclosure by the tobacco industry or any other person acting on its behalf of activities described as socially responsible or of the expenditures made for these activities, except when legally required to report on such expenditures, such as in an annual report.
4. Parties should not allow acceptance by any branch of government or the public sector of political, social, financial, educational, community or other contributions from the tobacco industry or from those working to further its interests, except for compensations due to legal settlements or mandated by law or legally binding and enforceable agreements.

Thus, in effect it can be said that as per Article 5.3, socially responsible activities of the tobacco industry be strictly regulated and that tobacco companies be prohibited from publicizing or disclosing their CSR activities, except as legally required, as this could amount to marketing/



advertising of their brand and creating goodwill.

There are three primary arguments<sup>79</sup> in favour of strictly regulating the CSR activities of tobacco companies:

**(i) Tobacco companies are increasingly resorting to corporate social responsibility (CSR) activities to continue their promotion to buy goodwill and credibility to earn political mileage:**

Fooks et al<sup>80</sup>, through their study of CSR strategy of BAT in the UK demonstrate how CSR has been used a tool to secure access to and maintain dialogue with policymakers at times of restricted contact between tobacco companies and government. The authors assert that in effect, BAT's CSR programme works as a form of "corporate political activity" and that BAT employees use CSR initiatives as a means of "issue definition". The authors further claim that BAT has strategically used CSR to expand the number of their access points across Government. Similarly, in another study<sup>81</sup>, the authors demonstrate that the tobacco industry uses CSR as a tool for stakeholder management geared at reducing the political impact of the public health advocates.

Dorfman et al.<sup>82</sup> also support the theory of tobacco industry using CSR activities as a means to thwart regulation and gain popular support. By studying the internal documents of Philip Morris' CSR strategy, they conclude that not only was the CSR programme aimed at changing public perception of the company, but also as a strategy to co-opt various interest groups that posed a threat to tobacco industry's programmes. In fact, these companies use CSR not just as a means to create external goodwill but also for better employee engagement within their companies. For instance, Hirschorn<sup>83</sup> studies the CSR development of Philip Morris and concludes that one of the principal corporate reasons for creating the CSR statement was to maintain employee morale.

**(ii) CSR is a form of sponsorship, which amounts to promotions and hence should be prohibited:**

Christian Aid's<sup>84</sup> noted report on the CSR activities of many transnational companies, including tobacco businesses, vehemently denounces CSR efforts of such companies as a tool for image making and "merely a branch of PR" even when the companies engage in seemingly harmless activities. For instance, according to the WHO report<sup>85</sup> on tobacco industry and corporate responsibility, the CSR programmes of tobacco companies are focused on youth smoking prevention, education, community-level development, and environment. However, the report goes on to claim that the funding towards education, especially in the form of university

79. See [http://seatca.org/dmdocuments/CSR%20Handout\\_2013\\_SEATCA%20%281%29.pdf](http://seatca.org/dmdocuments/CSR%20Handout_2013_SEATCA%20%281%29.pdf)

80. See Fooks GJ, Gilmore AB, Smith KE, Collin J, Holden C, et al. (2011) Corporate Social Responsibility and Access to Policy Élites: An Analysis of Tobacco Industry Documents

81. See Fooks, G., Gilmore, A., Collin, J., Holden, C., & Lee, K. (2013). The limits of corporate social responsibility: techniques of neutralization, stakeholder management and political CSR.

82. See Dorfman L, Cheyne A, Friedman LC, Wadud A, Gottlieb M (2012) Soda and Tobacco Industry Corporate Social Responsibility Campaigns: How Do They Compare?

83. Hirschhorn, N. (2004). Corporate social responsibility and the tobacco industry: hope or hype?

84. See - Christian Aid (2004). Behind the mask; the real face of corporate social responsibility.

85. Source - [www.who.int/tobacco/communications/CSR\\_report.pdf](http://www.who.int/tobacco/communications/CSR_report.pdf)



grants, is done with a view of the prestige that is associated with these institutions and also to “buy silence and complacency”. Similarly, it is noted in the report that programmes aimed at youth smoking prevention are actually ineffective and actually have the opposite result of encouraging the appeal of smoking among adolescents. Indeed, Hirschorn notes that, “in its approach to social responsibility, PM [Philip Morris] also claims that one of its key stakeholders is the “adult smoker” who makes the informed choice to smoke; and that the company must defend this right of choice”.

## **1. CSR must be addressed as part of de-normalising the tobacco industry**

The corporate social responsibility of the tobacco industry is, according to WHO, an inherent contradiction, as industry’s core functions are in conflict with the goals of public health policies with respect to tobacco control. Hirschorn<sup>5</sup> alleges that being in the tobacco business is “antithetical to CSR”. Indeed, critics of CSR programmes of tobacco industry also argue that these programmes are aimed at normalising the functioning of the industry. For instance, through her study of several tobacco companies, Friedman<sup>86</sup> claims that even after introducing CSR efforts, the tobacco companies have not made any substantive changes in the way they do business with regard to exposure to second-hand smoke and in fact, business remains as usual.

86. Source - <http://www.ncbi.nlm.nih.gov/pubmed/20122118>

## **2. Regulation of Tobacco Industry’s CSR Regulations in India**

### **(i) India - CSR and the New Companies Act, 2013:**

Section 135 of the Companies Act, 2013 of India mandates that Corporate Social Responsibility (CSR) must be practiced by all companies which have a net worth of Rs. 500 crore or more, or turnover of rupees 1000 crore or more or a net profit of Rs. 5 crore or more during any financial year. Furthermore, the law that covers all private and public limited companies, mandates that companies meeting the above criteria need to spend at least 2% of their average net profit for the immediately preceding three financial years on corporate social responsibility activities. Since there are no special provisions for tobacco companies under Section 135, it can be assumed that they too are obligated by law to spend the 2% of their average net profit on socially responsible activities. Thus, far from prohibiting or regulating CSR activities of tobacco companies as required by the Article 5.3 Guidelines, current law in India mandates tobacco companies to take part in CSR activities.

### **(ii) Litigation Challenging CSR by Tobacco Companies**



In 2014, a public interest litigation was filed in the Madras High Court by the state convenor of the Tamil Nadu People's Forum for Tobacco Control (TNPFTC), to demand that cigarette, beedi and kattha manufacturers be kept out of corporate social responsibility (CSR) initiatives.<sup>87</sup> The petitioner's argument was that CSR activities that tobacco companies engaged in were simply an avenue for tobacco companies to promote their brands and earn good will. Instead, the petition said that tobacco companies should be asked to pay their CSR contributions directly to state and central governments for welfare schemes.

The High Court directed the government to form an inter-ministerial panel to see how best the CSR scheme for the tobacco trade could be met and what model has to be framed for the same. An Inter-ministerial panel has now been set up to look into the exclusion of tobacco industries from CSR.<sup>88</sup> Officials from Health and Family Welfare, and Corporate Affairs Ministries, World Health Organisation, India and doctors from the All India Institute of Medical Science, among others, are part of the panel.

### 3. Examples of Legislation in Other Countries

A study of CSR related regulations of a few countries around the world suggests that while there is no complete ban on CSR activities of tobacco companies anywhere in the world, there are regulations (within tobacco regulation acts) that prohibit any brand promotion (through publicity via logos, name, sign, images, trademark, etc.) associated with CSR activities. Only in Vietnam has the government listed the activities that the tobacco companies can undertake as part of their CSR agenda. The Vietnamese government has passed legislation on tobacco control which limits CSR to programs of hunger eradication and poverty reduction control of natural disasters, and combating cigarette smuggling, and bans publicity on CSR activities in the mass media.

Interestingly, in a move to restrict acceptance of CSR funds at the beneficiary end, the department of education in Philippines has issued a circular restricting interaction of officials of the department with the tobacco industry and includes a prohibition of the tobacco industry contributing funds.

Below we look at the laws of a few countries to understand how CSR activities of tobacco companies are being regulated:

#### (i) Bangladesh<sup>89</sup>

87. (S. Cyril Alexander v. Union of India, Writ Petition No. 9955 of 2014, High Court of Judicature at Madras (2014))

88. See, "CSR by Tobacco Companies: Brand Promotion or Social Welfare," The Economic Times, dated December 28, 2014, available at [http://articles.economictimes.indiatimes.com/2014-12-28/news/57462589\\_1\\_csr-activities-tobacco-products-tobacco-control](http://articles.economictimes.indiatimes.com/2014-12-28/news/57462589_1_csr-activities-tobacco-products-tobacco-control)

89. Source - <http://www.tobacco-controllaws.org/legislation/country/bangladesh/laws>



Act: Consolidated Smoking and Tobacco Products Usage (Control) Act, 2005

Relevant Sections of the Act: Section 5. Provisions regarding prohibition of advertisement and promotion of tobacco products and control of sponsorship

- Ⓒ Section 5c: "No person shall provide or make provided any donation, award, scholarship or sponsor or make sponsored any program for the purpose of advertising tobacco products or inducing in the use of those products"

The explanation provided in the law after this section reads, "If any person participate in social activities as part of Corporate Social Responsibility or in case of providing fund for spending in those activities, he cannot use or make used name, sign, trademark, symbol of tobacco or institution manufacturing tobacco or motivate any other person to use those"

#### **(ii) Canada<sup>90</sup>**

In Canada, the law prohibits any publicity associated with CSR activities but does not prevent tobacco companies from making CSR contributions.

Act: Consolidation Tobacco Act, 2015

Relevant Sections of the Act: Section 24, 25 - Promotion

- Ⓒ Section 24 (Prohibition – Sponsorship Promotion): "No person may display a tobacco product-related brand element or the name of a tobacco manufacturer in a promotion that is used, directly or indirectly, in the sponsorship of a person, entity, event, activity or permanent facility."

- Ⓒ Section 25 (Prohibition – Name of Facility): "No person may display a tobacco product-related brand element or the name of a tobacco manufacturer on a permanent facility, as part of the name of the facility or otherwise, if the tobacco product-related brand element or name is thereby associated with a sports or cultural event or activity."

#### **(iii) Namibia<sup>91</sup>:**

Namibia prohibits the use of any tobacco trademarks, brand names and logos in any "organized activity" (defined below) and also prevents manufacturers, importers, distributors and retailers of tobacco products from making any contribution to such events.

Act: Tobacco Products Control Act, 2010

90. Source - <http://www.tobacco-controllaws.org/legislation/country/canada/laws>

91. Source - <http://www.tobacco-controllaws.org/legislation/country/namibia/laws>



Relevant Sections of the Act: Section 15 - Advertising, sponsorship and promotion

© Section 15 (1b): No person may, "use tobacco trade marks, logos, brand names used on tobacco products for the purpose of advertising any organisation, service activity or event."

© Section 15 (2b): No manufacturer, importer, distributor or retailer of tobacco products may

- make any financial contribution to any organised activity that is to take place, or is taking place, or has taken place in whole or in part in Namibia

"Organized activity" is defined as any activity or event organized for the purpose of entertainment, sport, recreation, education, or culture where a tobacco product, brand element, or tobacco manufacturer's company name is used in the name of or portrayal of the activity or event. Additionally, the regulations phase out existing sponsorships in place. The restrictions only apply to certain organized activities, and do not explicitly cover donations to individuals, organizations, or governments.

92. Source - <http://www.tobacco-controllaws.org/legislation/country/philippines/laws>

**(iv) Philippines<sup>92</sup>**

Act: Tobacco Regulation Act, 2003 (also called Republic Act No. 9211); Department of Education Order No. 6/2012

Relevant Sections of the Republic Act 9211: Section 26 - Ban on Sponsorships

© Section 26: "Beginning 1 July 2008, cigarette and tobacco companies are hereby prohibited from sponsoring any sport, concert, cultural or art event, as well as individual and team athletes, artists or performers where such sponsorship shall require or involve the advertisement or promotion of any cigarette or tobacco company, tobacco product or tobacco use, name, logo or trademarks and other words, symbols, designs, colors or other depictions commonly associated with or likely to identify a tobacco product: Provided, That the attribution only to the name of the company in the roster of sponsors shall be allowed: Provided further, That no manufacturer may register a tobacco brand name as a company name after the passage of this Act."

Relevant Sections of the Department of Education Order No. 6/2012: Section 2 - Prohibitions



**C** Section 2c: Accepting Gifts, Donations and Sponsorship -  
“Public officials and employees shall not solicit or accept, directly or indirectly any gifts, gratuity, favor, entertainment loan or anything of monetary value in the course of their official duties or in connection with any operation being regulated by or any transaction which may be affected by the functions of their office from any person or business related to the tobacco industry.

This prohibition covers the donation of funds or anything of monetary value, including, but not limited to, the conduct of refurbishing and restoration programs, construction of classrooms, school stages and other facilities, school feeding programs, provision of school supplies and other facilities, school feeding programs, provision of school supplies and materials, installation of facilities for multi-media programs, sponsorship of medical and dental check-ups and other activities.

#### **(v) Vietnam<sup>93</sup>**

Vietnam has a law that stipulates the kinds of CSR activities that tobacco companies are permitted to do.

Act: Law on prevention and control of tobacco harms

Relevant Sections of the Act: Article 16 - Sponsorship Activities

**C** Article 16: “Organizations and individuals trading in tobacco products are only allowed to conduct philanthropy sponsorship for programs of hunger eradication and poverty reduction; prevention and control of natural disasters, epidemics, disasters; and for combating cigarette smuggling, without announcing in the mass media about the sponsorship.”

#### **CONCLUSION:**

CSR can be a powerful tool that tobacco companies use to improve their image and promote their products. In implementing this Recommendation of the Article 5.3 Guidelines most countries have not enacted an outright prohibition on CSR activities by tobacco companies, but have instead placed prohibitions on sponsorship and on publicizing the CSR activity. In India, the Companies Act 2013 directly contradicts the Article 5.3 Guidelines as it mandates that all companies including tobacco companies carry out CSR activities. However, it needs to be recognized that CSR activities are fundamentally a way for tobacco companies to gain publicity and

93. Source - <http://www.tobacco-controllaws.org/legislation/country/vietnam/laws>



promote their brand and, therefore, need to be tightly controlled and restricted.



## **CHAPTER 4**

### **LAWS AND POLICIES ON TRANSPARENCY AND CONFLICTS OF INTEREST IN INDIA**

As discussed in the preceding chapters, India has to date made little headway in the implementation of Article 5.3 of the FCTC. There are currently no laws or policies specifically aimed at the tobacco industry to limit its interactions with the government, ensure transparency in the government's dealings with the tobacco industry or to prevent conflicts of interest from hindering the government's policy making on tobacco control in the interests of public health. However, instances of conflicts of interest between the government and industry and cases where such conflicts have derailed policy making or implementation have, in the past few years, begun to gain greater visibility and media coverage in India. Growing public awareness of the detrimental effects of conflicts of interests taking over public policy decision making as well as recent high profile scandals involving conflicts of interest, have led to various initiatives to check conflicts of interests in different spheres of governance and in different industries.

This Chapter outlines existing laws and policies as well as new proposals and initiatives in India to deal with conflicts of interest. Some of these laws and policies are of general application while others apply to specific industries. The purpose of this discussion is to explore whether there are possibilities of extending some of these laws and policies to the area of tobacco control.

#### **1. Laws and Policies on Transparency**

Transparency is often seen as going hand in hand with preventing conflicts of interest as transparency is essential for identifying conflicts in the first place. Transparency is typically promoted through laws that mandate disclosure and reporting of information on a periodic basis. Below we discuss two statutes in India that place disclosure obligations on the part of companies as well as political parties.

##### **(i) Companies Act - Obligation on Companies to Disclose Political Contributions**

Section 182 (Prohibitions and Restrictions regarding political contributions) of the Companies Act, 2013 places certain restrictions and disclosure requirements on direct and indirect contributions made



to political parties:

- Ⓒ Any company that is not a government company or a company that has been in existence for less than 3 financial years, may contribute any amount directly or indirect to any political party. The total contribution in any financial year cannot exceed 7.5% of the company's average net profits in the three immediately preceding financial years.
- Ⓒ The company is required to disclose in its profit and loss account the total amount of such contributions to political parties in any financial year with particulars of the amount so contributed and the political party to which it was contributed.
- Ⓒ These provisions also apply to (i) "a donation or subscription or payment" given by or on behalf of the company to a person who "to its knowledge, is carrying on any activity which, at the time at which such donation or subscription or payment was given or made, can reasonably be regarded as likely to affect public support for a political party" and (ii) to expenditures incurred by the company for an advertisement in any publication (including a brochure, souvenir or pamphlet) which is by or on behalf of a political party or for the advantage of a political party.

94. <http://www.tribuneindia.com/2012/20120604/main2.htm>

These provisions of the Companies Act, 2013 would apply to all companies incorporated in India, including tobacco companies and can be used to monitor political contributions made by tobacco companies. Indeed, as mentioned in Chapter 2, the profit and loss accounts of the Indian Tobacco Company Ltd. for the 2012 – 13 financial year revealed that it had made large political contributions amounting to nearly Rs. 6 crores (60 million) to a number of political parties.<sup>94</sup>

While a useful starting point, there are several loopholes with this provision that may not make it a particularly effective tool to monitor the tobacco industry's interactions with government or its attempts to influence policy. First, the requirement is only to disclose monetary contributions or expenditures, and does not apply to other forms of interactions or lobbying efforts by tobacco companies that may not involve a specific monetary contribution. Secondly, it applies only to contributions made directly or indirectly to a political party and does not apply more broadly to lobbying of government officials in general.

#### **(ii) Representation of the People Act, 1951 - Disclosure Obligation on Political Parties and Elected Candidates**

The Representation of the People Act, 1951 governs the conduct of



elections in India as well as procedures to be followed by candidates running for public office.




### **a. Disclosure Obligation on Political Parties**

Sections 29-B and 29-C of the Act deal with contributions to political parties. Section 29-B provides that any political party may “accept any amount of contribution voluntarily offered to it by any person or company other than a Government company.” The only restriction is that political parties cannot accept contributions from a foreign source. Section 29-C requires political parties to prepare a report of all contributions received from individuals and companies in excess of a specified amount (Rs. 20,000).

These provisions are a useful tool to monitor contributions received by political parties from the tobacco industry. However, they only require disclosure in a report which is primarily a document used for tax relief purposes and therefore serves limited value in terms of monitoring interactions between the government and the tobacco industry. Further, these laws do not take the next step of banning tobacco companies from making political contributions as some countries (mentioned in Chapter III) have done.

### **b. Disclosure Obligations on Elected Candidates**

Section 75-A of the Representation of the People Act requires all candidates elected to the upper or lower houses of Parliament to furnish information relating to:

-  The moveable and immoveable property of which he, his spouse and his dependant children are owners or beneficiaries;
-  His liabilities to any public financial institution; and
-  His liabilities to the Central or State Governments.

This provision could shed light on any connections or interests that public officials might have in the tobacco industry (such as share ownerships). However, it is limited in that this applies only to elected candidates and not to the numerous public officials and employees who may be working in the government’s health department. Further, this law only requires elected candidates to declare their assets and liabilities, but not their interests.<sup>95</sup> Thus, prior employment of an elected candidate in a tobacco company or his/her presence on the board of a tobacco company would not be disclosed under this provision.

95. PRS Legislative Brief – “Conflicts of Interest Issues in Parliament,” available at [http://www.prsindia.org/administrator/uploads/general/1370583452\\_Conflict%20of%20Interest.pdf](http://www.prsindia.org/administrator/uploads/general/1370583452_Conflict%20of%20Interest.pdf)



While these laws on transparency are inadequate, there is evidence that even existing laws are not being complied with. In 1996, the Supreme Court delivered a judgment in a public interest petition brought by the NGO, Common Cause,<sup>96</sup> which alleged widespread non-compliance by political parties with the disclosure requirements under the Representation of People's Act and the Income Tax Act. The petition pointed out that the cumulative effect of the provisions in the Companies Act, Representation of People's Act and the Income Tax Act was to bring transparency to election funding. However, political parties were in blatant violation of most of these provisions and, indeed, some parties had not even filed their income tax returns for certain financial years. Further, the Union Government and the Income Tax Department had taken no action against political parties who had violated these laws. The Court held that those political parties that had failed to file their returns had prima facie violated the statutory provisions of the Income Tax Act and that tax authorities had been "wholly remiss in the performance of their statutory duties under law." The Court directed the Union Government to (a) conduct an investigation on all defaulting political parties and take necessary action and (b) appoint an inquiring body to investigate the circumstances under which the income tax return filing requirements for political parties was not being enforced and to take appropriate action against any officers found responsible.

Currently, there is much debate on whether political parties should be brought within the ambit of the Right to Information Act, 2005, in order to ensure greater transparency in their funding sources. The Central Information Commission had previously ruled that political parties did fall within the purview of the RTI Act and directed that they comply with the Act, but political parties have so far ignored these orders.<sup>97</sup> The Supreme Court is currently considering a public interest petition filed by the Association for Democratic Reforms on the same, where the key issue is whether political parties constitute "public authorities" for purposes of the Act.<sup>98</sup> At a time when other disclosure obligations of political parties are very limited and poorly enforced, bringing political parties within the ambit of the relatively more robust RTI Act would be a welcome move towards ensuring greater transparency.

## 2. Laws and Policies on Conflicts of Interest

### (i) Conflicts of Interest Norms for Members of Parliament and Minister in India

In India, Members of Parliament ("MPs") can have private interests and occupations outside of their public duties and may be business owners,

96. Common Cause v. Union of India & Ors. AIR 1996 SC 3081.

97. CIC Order, File No. CIC/SM/C/001386, dated June 3, 2013.

98. See, for example, "Parties under RTI: SC Sends Notice to Election Commission, Centre, The Indian Express, dated July 8, 2015, available at <http://indianexpress.com/article/india/politics/supreme-court-notice-to-centre-on-plea-to-get-political-parties-under-rti/>; J. Kothari and A. Ravi, "Bringing Parties under RTI Gamit for Effective Government," The New Indian Express, dated August 30, 2015, available at <http://www.newindianexpress.com/columns/Bring-Parties-Under-RTI-Ambit-for-Effective-Government/2015/08/30/article3000137.ece>



lawyers, agriculturists or other professionals. Conflicts of interest that arise out of an MP's private interests are governed by various codes of conduct that apply to MPs in the upper and lower house of Parliament. These include the Code of Conduct for Ministers, Code of Conduct for Members of the Rajya Sabha, Rules of Procedure and Conduct of Business in the Lok Sabha and Rajya Sabha and the Handbook for Members. Both houses also have an Ethics Committee that oversees the conducts of its members. These Codes of Conduct place the following requirements on MPs when dealing with conflicts of interest and are slightly different in the Lok Sabha and the Rajya Sabha (the upper and lower houses of Parliament respectively).

a. General Rules governing Lok Sabha MPs:

The General Rules in the Lok Sabha Handbook include the following provisions relating to an MP's conflict of interest:<sup>99</sup>

- Ⓒ A member should not unduly influence the Government officials or the Ministers in a case in which one is interested financially either directly or indirectly.
- Ⓒ A member should not receive hospitality of any kind for any work one desires or proposes to do from a person or organisation on whose behalf the work is to be done by them.
- Ⓒ A member should not write recommendatory letters or speak to Government officials for employment or business contacts for any relation or other person in whom the member is directly or indirectly interested.
- Ⓒ A member having a personal, pecuniary or direct interest in a matter to be decided by the House is expected, while taking part in the proceedings on that matter, to declare her/his interest. It would avoid raising of objections regarding her/his vote at the time of division.

99. Rule 334A, Chapter II: General, Handbook for Members of Lok Sabha (16<sup>th</sup> edn., 2014) available at <http://164.100.47.132/LssNew/members/membersbook/chapter2.pdf>.

As is clear from the above rules, MPs in the Lok Sabha are not prohibited from voting or participating in discussions on matters in which they have a pecuniary or financial interest as the only requirement is that they must declare their interest in advance.

b. Conflicts of Interest in Parliamentary Committees:

The Handbook for Lok Sabha members also discusses situations where an MP on a parliamentary committee might have a conflict of interest. The interesting point to note about these rules is that they do not provide for a blanket prohibition from serving in a parliamentary



committee on a matter in which an MP might have a personal or pecuniary interest. Instead, the rules only provide that another MP may object to the inclusion of an MP on a parliamentary committee in which he has an interest. This is an extremely water-down method of monitoring conflicts of interest as it relies solely on other MPs to bring up conflicts of interest issues as arise.

#### Chapter 26: Parliamentary Committees:

255. Where an objection is taken to the inclusion of a member in a Committee on the ground that the member has a personal, pecuniary or direct interest of such an intimate character that it may prejudicially affect the consideration of any matters to be considered by the Committee.

(d) The Speaker, shall, after considering the evidence so tendered, give decision which shall be final;

(e) Until the Speaker has given the decision under clause (d), the member against whose appointment on the Committee objection has been taken shall continue to be a member thereof if elected or nominated and take part in discussion, but shall not be entitled to vote; and

(f) if the Speaker holds that the member against whose appointment objection has been taken has a personal, pecuniary or direct interest in the matter before the Committee, that member shall cease to be a member thereof forthwith: Provided that the proceedings of the sitting of the Committee at which such member was present shall not in any way be affected by the decision of the Speaker.

#### c. Conflict of Interest Provisions for Rajya Sabha MPs:

The conflicts of interest rules governing MPs in the Rajya Sabha are more stringent and actually prohibit MPs from participating in discussions or voting on matters in which they have an interest. Section 294 (Declaration of Interests) of the Rules of Procedures and Conduct of Business in the Council of States<sup>100</sup> provides:

(i) Whenever a member has a personal or specific pecuniary interest (direct or indirect) in a matter being considered by the Council or a Committee thereof, he shall declare the nature of such interest notwithstanding any registration of his interests in the Register, and shall not participate in any debate taking place in the Council or its Committees before making such declaration.

(ii) On a division in the Council if the vote of a member is challenged on

100. Committee on Ethics, Rules of Procedure and Conduct of Business in the Council of States (7<sup>th</sup> edn, 2010) available at [http://rajyasabha.nic.in/rsnew/rs\\_rule/rules7th.pdf](http://rajyasabha.nic.in/rsnew/rs_rule/rules7th.pdf).



the ground of personal, pecuniary or direct interest in the matter to be decided, the Chairman may, if he considers necessary, call upon the member making the challenge to state precisely the grounds of his objection, and the member whose vote has been challenged shall state his case, and the Chairman shall then decide whether the vote of the member should be disallowed or not and his decision shall be final: Provided that the vote of a member is challenged immediately after the division is over and before the result is announced by the Chairman.

In addition, the Handbook for Rajya Sabha MPs is more prescriptive and actually obligates MPs to subordinate their private interests to their public duties:

(iii) In their dealings if Members find that there is a conflict between their personal interests and the public trust which they hold, they should resolve such a conflict in a manner that their private interests are subordinated to the duty of their public office.

(iv) Members should always see that their private financial interests and those of the members of their immediate family do not come in conflict with the public interest and if any such conflict ever arises, they should try to resolve such a conflict in a manner that the public interest is not jeopardised.

(v) Members should never expect or accept any fee, remuneration or benefit for a vote given or not given by them on the floor of the House, for introducing a Bill, for moving a resolution or desisting from moving a resolution, putting a question or abstaining from asking a question or participating in the deliberations of the House or a Parliamentary Committee.

(vi) Members should not take a gift which may interfere with honest and impartial discharge of their official duties.

#### (a) Code of Conduct for Ministers

A Minister (both in the Union Government and the state governments) cannot have any connection with the management or affairs of business with which he had an interest prior to becoming a minister capacity, though ministers may retain share ownerships in such a business. A Minister may also not have any association including share ownership in a business which provides services to the government.<sup>101</sup> However, these provisions do not in reality provide for a total severance of ties from the business as the Minister may transfer his ownership or management interests to an adult relative other than his spouse. A

101. Code of Conduct for Ministers (both Union and State), Ministry of Home Affairs, Government of India.






Minister would need prior permission if he/she has a relative employed or associated with such a business. A Minister cannot accept gifts or contributions from persons he deals with officially.<sup>102</sup>

As is clear from above, while there are codes to govern conflicts of interest for Members of Parliament and Ministers, their scope, particularly in the case of Lok Sabha MPs, is largely limited to disclosure of interests. The provisions around conflicts in the context of Parliamentary Committees are particularly weak as it is left to other MPs to challenge an MP's interest on any given matter. If most MPs are likely to be conflicted at some point in time, they may have little incentive to challenge their fellow MPs' vested interests. We believe this loophole in the regulations should be urgently addressed in light of the numerous cases (including the Packaging Rules debacle) of Parliamentary Committees being constituted with MPs with vested interests. For example, a response to a query under the Right to Information Act revealed that as of July 2010, no MP had made a declaration of a pecuniary or other interest and no vote had ever been challenged on this ground in the preceding five years.<sup>103</sup>

The provisions around conflicts are slightly more stringent in the case of Rajya Sabha MPs and Ministers. However, even here there are loopholes as Ministers may continue to own shares in businesses that they previously managed and may even continue to exercise defacto control over the business by transferring it to a family members.

#### (b) Conflicts of Interest Codes for Civil Servants

Government officials involved in setting public health policies on tobacco control don't include just MPs and Ministers but also officials lower down the chain who could be susceptible to conflicts. The Central Civil Services (Conduct) Rules<sup>104</sup> deal with conflicts of interest for government civil servants:

-  Civil servants are required to declare any private interests that may influence their public duties and resolve them in a way that puts the public interest first. Civil servants are also to ensure that they do not put themselves in a position of having financial obligations that may influence their public duties.<sup>105</sup>
-  Officers should recuse themselves from a contract award where a dependant is employed.<sup>106</sup> Permission is required if a dependant of a public official wishes to secure employment in a private firm with which the public official is involved as part of his public duties.
-  Civil servants are required to report their assets and liabilities when they are first appointed and to provide updates for transactions

102. Code of Conduct for Ministers (both Union and State), Ministry of Home Affairs, Government of India.

103. PRS Legislative Brief—"Conflicts of Interest Issues in Parliament," available at [ ]

104. Central Civil Services (Conduct) Rules, 1964, available at [http://persmin.gov.in/DOPT/EmployeesCorner/Acts\\_Rules/CCSRules\\_1964/CCS\\_Conduct\\_Rules\\_1964\\_Updated\\_27Feb15.pdf](http://persmin.gov.in/DOPT/EmployeesCorner/Acts_Rules/CCSRules_1964/CCS_Conduct_Rules_1964_Updated_27Feb15.pdf)

105. Central Civil Services (Conduct) Rules, Rule 3.

106. Central Civil Services (Conduct) Rules, Rule 4.



that exceed a specified amount in value.

- C Civil servants are prohibited from speculating in stocks or other investments or from taking part in a commercial business activity while in office. Civil servants are also prohibited from taking up employment in a commercial business for a period of one year after retirement.<sup>107</sup>

The conduct rules for civil servants are more comprehensive than those for MPs. However, these rules apply only to general conflicts of interest and do not touch on a civil servant's interaction with industry, including the tobacco industry.

### **(i) Prevention and Management of Conflict of Interest Bill**

In recent months, cases of MPs participating in Parliamentary Committees on issues where they have a clear conflict of interest (as was the case with the Parliamentary Committee on Subordinate Legislation that was tasked with reviewing new Pack Warning Rules) have caused much public outcry. The issue of conflicts has become pervasive not only in the case of big tobacco but various other public health issues, with beverage companies, vaccine manufacturers and drug companies all fearing regulation and using similar tactics.<sup>108</sup> Against this backdrop, it seemed an opportune moment for a conflicts of interest bill to be introduced in Parliament. In April 2015, a private member bill titled "Prevention and Management of Conflict of Interest Bill" was introduced in the Rajya Sabha (the upper house of Parliament).<sup>109</sup> While the Bill was not taken up for procedural reasons it has a number of useful features that could make it a very useful tool in identifying conflicts:

- C Unlike the provisions described above that apply only to Members of Parliament, Ministers and Civil Servants, the Prevention and Management of Conflict of Interest Bill applies to all "public authorities or bodies." Public authorities or bodies" are defined broadly to include all departments and ministries of the state and central governments, any authority or body established under the Constitution or a central or state law, any authority or body that is owned controlled or funded by a state government or the central government as well as any non-government organization substantially financed by a state government or the central government, research institutions and universities whose facilities and experts are utilized by the government or other public bodies for decision making and private organizations whose facilities and employees are used

107. Central Civil Services (Conduct) Rules, Rules 15 and 16.

108. "When Public Health and Private Interests Cross Paths," The Hindu Business Line, dated May 1, 2015

109. Text of the Bill is available at <http://www.aaci-india.org/doc/DRAFT-BILL-COI.pdf>



by the government or other public bodies for decision making. A "Public Official" is similarly broadly defined to include any person "employed or for the time being engaged by the public authority or body... and includes any member of a committee or consultative group constituted by the public authority or body for purposes of a public project." This is a useful way of defining the scope of the Bill as it focuses not on a particular position or kind of authority, but rather on the role that the authority plays in public policy decision making.

- Conflict of interest is defined as "the existence of conflict between the public duty of a public official or consultant and the private interest of such official or consultant or any other person, in which the private interest of such official, consultant or other person could improperly influence the performance of official duties and responsibilities by any person, or result in a breach of public trust, or be calculated to further the private or commercial interest of any person or organisation;" The Bill further goes on to clarify that a conflict of interest could exist even if no unethical or improper conduct results from it, as it is the perception of influence itself that could undermine confidence in the public official or department concerned.
- The Bill also for the first time addresses the problem with the revolving door phenomenon by providing that a conflict exists if a public official was associated with a private organization in the preceding 24 months prior to his public appointment or in the 24 months following termination of his public appointment.
- In addition the Bill includes prohibitions on public authorities engaging persons who have conflicts of interest, mandatory disclosure requirements for public officials and the constitution of a Conflicts of Interest Commission.

## **(ii) Conflicts of Interest Codes in Other Industries:**

In addition to laws and policies of general application, we looked into whether other industries or regulatory bodies had adopted codes of conduct around conflicts of interest. Below are two examples from the food and pharmaceutical industries. In both cases, the codes are relatively and not fully operative and, hence, there is little empirical evidence available to judge their effectiveness.

### **a. Food Safety Standards Authority of India**

In January 2010, the Food Safety Standards Authority of India (FSSAI)



came up with draft guidelines for conflict of Interest disclosures and confidentiality protocols for its members. While the Draft Guidelines were put up for consultation, inviting comments and remarks from all stakeholders including the public, they are yet to be finalized.<sup>110</sup> The focus of these draft guidelines was to enhance the integrity of its members. Two ethical principles were advocated under these Guidelines, namely, confidentiality and the avoidance of conflicts of interest. Three types of conflicts of interest of the members were identified by the guidelines: personal, business and professional. However, the Draft Guidelines only stipulate disclosure of conflicts and do not require recusals or other procedures.

The interests to be disclosed include employment, consultancy contracts, positions in advisory and scientific boards or corporate boards in industry, positions in Non-Government Organizations or international agencies, fee paid work, memberships or affiliations in related organizations and shareholdings.

The financial interests of Members and/or their organization would constitute a key conflict of interest, meriting appropriate disclosure. If organizations are served without financial compensation (pro bono) even that would merit disclosure. Financial interest would also include potential interests that are being negotiated.

110. Draft Guidelines for Conflict of Interest Disclosures and Confidentiality Protocols for Members, Food Safety and Standards Authority of India available at <http://www.fssai.gov.in/Archives/DraftforConsultations/January2010.aspx>.

## **b. Code of Ethics for the Pharmaceutical Industry:**

The Department of Pharmaceuticals under the directions of the Ministry of Chemicals and Fertilizers, Government of India prepared a uniform code of ethics for pharmaceutical marketing practices. These guidelines were to be voluntarily adopted and complied with by the pharmaceutical industry for a period of six months with effect from January 1, 2015. The Government is to review voluntary compliance with the guidelines and may consider making compliance mandatory if it found the level of voluntary compliance to be unsatisfactory.

Some provisions of the Code of Ethics worth highlighting include:

### **6. Gifts:**

6.1 No gifts, pecuniary advantages or benefits of any kind may be supplied, offered or promised to persons qualified to prescribe or supply drugs by a pharmaceutical company or any of its agents i.e., distributors, wholesalers and retailers etc.

6.2 Gifts for the personal benefit of healthcare professionals and family members (both immediate and extended) such as tickets to

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entertainment events also are not be offered or provided.

## 7. Relationship with Healthcare Professionals:

7.1 Travel facilities: companies or their associations/ representative or any person acting on their behalf shall not extend any travel facility inside the country or outside, including rail, air, ship, cruise tickets, paid vacations, etc., to Health Care Professionals and their family members for vacation or for attending conference, seminars, workshops, CME programme etc. as a delegate. It is hereby clarified that in any seminar, conference or meeting organized by a pharmaceutical company for promoting a drug or disseminating information, if a medical practitioner participates as a delegate, it will be on his/her own cost.

7.2 Hospitality: companies or their associations/representatives shall not extend any hospitality like hotel accommodation to HealthCare Professionals and their family members under any pretext.

7.3 Cash or monetary grants: companies or their associations and representatives shall not pay any cash or monetary grants to any healthcare professional for individual purpose in individual capacity under any pretext. Funding for medical research, study etc., can only be extended through approved institutions by modalities laid down by law/rules/guidelines adopted by such approved institutions, in a transparent manner. It shall always be fully disclosed.

The Department of Pharmaceuticals comprises of representative members from the biggest pharmaceutical associations, within the industry- IDMA, BDMA, OPPI, IPA and AISSPMA. The above guidelines can be seen to have been influenced by the regulations of ethical conduct brought out by the Medical Council of India in 2009, with the sanction of the Central Government by amending the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation 2002 as a code of conduct for doctors and associations of doctors in their relationship with pharmaceutical and allied health sector industry.<sup>111</sup>

These guidelines have been voluntarily adopted and implemented within the pharmaceutical industry by drug industry associations such as the IDMA<sup>112</sup> and multinational pharmaceutical companies such as Reddy's Laboratories<sup>113</sup> etc. While, based on the inputs received so far, the Government seeks to make the code mandatory, the pharmaceutical industry has responded critically to the code. For example, the industry has been critical of the implications of a complete ban on any form of benefits to the Healthcare Professionals and their

111. Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation 2002, Medical Council of India available at <http://www.mciindia.org/RulesandRegulations/CodeofMedicalEthicsRegulations2002.aspx>

112. Clause 6.8, UCPMP, Indian Drug Manufacturers Association available at <http://www.idma-assn.org/ucpmp.html>.

113. UCPMA, Press Releases, Dr. Reddy's available at <http://www.drreddys.com/media/press-releases.html>.



suggestion to legalise it and regulate it by imposing a limit.<sup>114</sup> The issues that the Government currently faces with the implementation of the Code are indicative of the challenges involved in implementing voluntary codes as well as in seeking inputs from the very industry that the code intends to regulate.

114. S.Jagdale, *UCMP: Code word for Pharma Industry*, Express Pharma available at <http://www.financialexpress.com/article/pharma/management-pharma/ucpmp-code-word-for-pharma-industry/82206/>.



## CONCLUSION

In this Report we reviewed India's implementation of Article 5.3 of the FCTC with reference to three broad areas: interactions between the government and the tobacco industry and preferential treatment to the tobacco industry, various kinds of conflicts of interest in the context of making and implementing tobacco control laws, and regulating the CSR activities of tobacco companies. In all of these areas, we found numerous examples of non-compliance with the Article 5.3 Guidelines. Further, India does not have any laws or policies in place that are specific to the tobacco industry and address the concerns of Article 5.3. In fact, two laws, the Tobacco Board Act and the CSR provisions of the Companies Act, 2013, directly contradict the Article 5.3 Guidelines. The existence of the Tobacco Board is a particularly serious violation as it provides a forum for easy interaction between government officials regulating tobacco and the tobacco industry, allows industry representatives to be involved in policy making around tobacco regulation and involves a government body promoting the tobacco industry and providing subsidies and incentives for tobacco cultivation.

While India has some laws of general application regarding transparency, and conflicts of interest, the scope of these laws is limited to specific kinds of government officials or to Members of Parliament. To a certain extent better implementation of these laws in itself would be helpful in identifying and monitoring conflicts of interest. A case in point is the requirement for MPs to disclose their interest in any matter that is put to a vote. Yet, as seen in Chapter 4, these laws have limited teeth as they are primarily requirements for disclosure. Codes specific to certain industries are similarly watered down and the case of the Code of Ethics for the pharmaceutical industry reveals the problems involved with voluntary codes.

Our review of legislation from around the world reveals that a number of countries have relied on a combination of laws that are specific to the tobacco industry and laws of general application to implement the letter and spirit of Article 5.3. The tobacco specific laws include: (i) codes of conduct that many South East Asian countries have developed to set out procedures for governing interactions between the tobacco industry and those working on public health, (ii) laws that prohibit tobacco companies from making political contributions (Tasmania)



and Kosovo) or prohibit government departments from accepting donations from the tobacco industry (Philippines), (iii) laws that prohibit any type of sponsorship of tobacco industry events by the government (Thailand, Namibia, the Philippines), and (iv) laws and policies requiring governments to divest any holdings in the tobacco industry (Norway, Australia, New Zealand, Norway, Hong Kong).

Some countries have also relied on laws of general application to implement the Article 5.3 Guidelines. Canada is a good example of this approach as it includes laws that require the registration of all lobbyists and a conflict of interest code for public officials which prohibits government officials from accepting board memberships, employment or service contracts with a business with which they had significant dealings while in office for a period of one year after leaving office. Much of the tobacco control legislation around the world is relatively recent making it difficult to assess their effectiveness in practice. However, the empirical evidence to date suggests that some South East Asian countries which have relatively robust laws around tobacco related conflicts of interest such as Thailand and the Philippines have been quite successful in implementing tobacco control measures.

We suggest that to achieve the effective implementation of Article 5.3, India would need to make at least three changes to existing legislative framework for tobacco control:

- First, the Tobacco Board Act, which contradicts the core principles of the FCTC and Article 5.3 needs to be repealed and the Tobacco Board either disbanded or its mission redefined. In particular, the Tobacco Board should stop providing subsidies and incentives for tobacco growing and the government should instead focus its efforts on rehabilitation of tobacco farmers and supporting them in transitioning to alternative crops.
- Second, India will need to enact certain laws on transparency and conflicts that are specific to the tobacco industry, such as the prohibition on political contributions, regulating CSR or a code of conduct for how those working in public health are to interact with the tobacco industry. Such industry specific laws are critical in light of the particularly harmful nature of tobacco products which necessitates more stringent conflict and transparency rules when compared to other industries.
- Third, there is currently no clarity from the government on how CSR activities of tobacco companies are to be regulated. Most other jurisdictions have laws that prohibit tobacco companies



from any publicity associated with their CSR. Following a public interest petition in the Madras High Court, the Court directed the Union Government to form an inter-ministerial committee to look into devising a scheme to regulate CSR activities of tobacco companies. To date, such a scheme has not been formulated. As the Article 5.3 Guidelines as well as other commentators have made clear, there is an inherent contradiction between CSR and the tobacco industry's core functions and aims, and CSR is often used by tobacco companies to earn goodwill and improve their image. It is, therefore, imperative that the government develop a scheme or policy on CSR that ensures that tobacco companies do not derive any benefits from such activities.

**C** Finally, these industry specific laws could be coupled with laws of more general application on conflicts of interest and transparency given the urgent need for regulating conflicts of interest in various public policy contexts in India. In this regard, the time appears ripe for the introduction of a conflict of interest law such as the Prevention and Management of Conflicts of Interest Bill (2015). Unlike the weak and piecemeal approach reflected in other laws and policies, this Bill adopts a holistic view of conflicts and hits at the heart of the matter – to prevent private interests from influencing public policy decision making. Another move that would go a long way in advancing transparency would be to bring political parties within the ambit of the RTI Act. A public interest petition on this issue is currently pending before the Supreme Court and it is hoped that the Court recognizes the critical need for greater transparency on the funding sources for political parties.





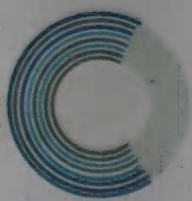












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